



10-1-1952

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Recommended Citation

Sylvester Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, 28 Notre Dame L. Rev. 1 (1952).
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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XXVIII

FALL, 1952

No. 1

PARTICIPATION BY THE STATES IN THE ENFORCEMENT AND DEVELOPMENT OF NATIONAL LABOR POLICY*

ALL over the country during the last few years, and with increasing frequency after the Supreme Court indicated in 1950 that not all union conduct is protected by the right of free speech,¹ labor-union attorneys have been attempting to establish immunity in the state courts for unlawful union action on the basis of the argument that the Federal Government has pre-empted the "field" of labor relations regulation. We contend here that this argument, also advanced in the learned journals,² has no foundation in law; that, if it succeeds, effective enforce-

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¹ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949); *Hughes v. Superior Court of California*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (1950); *Building Service Employees International Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045 (1950).

² Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 334 *et seq.* (1951); Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Feldblum, *Some Aspects of Minority Union Picketing in New York*, 20 FORD. L. REV. 176, 193 *et seq.* (1951). Cf. Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593 (1948).

ment of the existing national labor policy will be impeded; and that a general ouster of state jurisdiction at this time would inhibit far more than it would stimulate the development of a viable, comprehensive labor policy for the country. Put positively, we contend that while uniformity in labor policy and law throughout the nation is desirable, dominant considerations favor the participation of the states, to a limited extent, in the enforcement and development of national labor policy. We shall see that the Constitution, Supreme Court decisions and certain internal necessities of administration foreclose all state action which either presently or potentially conflicts with national action, and even some state action which is consistent with national action. But we shall also see that neither the Constitution, existing labor relations legislation, applicable Supreme Court decisions, nor practical considerations call for a complete ouster of state action. We shall contend that the best hope for an enduring labor policy lies in deliberate encouragement of state participation in its development.

I.

The Doctrine of Pre-Emption by Occupation of the Field and Its Implications

An ancient sage once said that there are more ways than one to skin a cat.

The currently approved version of labor-law history in this country informs us that trade unions were engaged until roughly the year 1930 in an uneven struggle with a basely unfair legal system, a system in which "property" rights were exalted over "human" rights, in which employers had gross advantages over struggling labor unions. Then in the 'thirties, this version of history continues, the law became more nearly just: Anti-injunction

legislation³ kept the courts from using the law to the undue advantage of employers and nonunion employees; labor relations legislation⁴ went as far as law can, short of absolute compulsion, in building up labor unions. In the early 'forties the trend toward justice accelerated: The Sherman Act was erased as a check on union action,⁵ and, in case there might be a few weapons left in the arsenal of the anti-union forces, the Constitution of the United States was inserted as a bar to their use.⁶ But later in the 'forties, in 1947 to be exact, the forces of reaction, momentarily in power, imposed on an unconscious but still unwilling nation a piece of legislation, the Taft-Hartley Act,⁷ which was designed to enslave the workingman and to erode the manifestly just legislative program of the 'thirties. In the late 'forties and the early 'fifties came the unkindest cut of all — the Supreme Court's restrictive interpretation⁸ of the scope of constitutional protection argumentatively afforded labor-union action by the decisions of the early 'forties. For the forces of justice, then, the prospects seemed dim, as of the year 1950. In that year it seemed sound to assert that the law had reverted to its earlier posture of unfairness, or, to put the matter another way, that the law was intent upon interfering with the freedom of action of unions in about the same way that it has interfered with the freedom of action of businessmen and all other persons engaged in the pursuit of their own interests.

³ *E.g.*, the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. §§101-115 (1946).

⁴ *E.g.*, the Wagner Act, officially the National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. §§ 151 *et seq.* (1946).

⁵ *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941).

⁶ *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

⁷ Officially the Labor Management Relations Act, 1947, 61 STAT. 136 (1947), 29 U.S.C. §§ 141 *et seq.* (Supp. 1952).

⁸ See note 1 *supra*.

This would never do, for somehow it was felt that unions required special immunities. The great need was for some device which would restore the *status quo ante* 1947-1950. The legislatures, state and national, seemed strangely churlish, the public completely unaware of the social dangers inherent in regulation of union conduct. Heightening the desperation of the situation, the Constitution seemed to become sterile. Obviously, with all relatively straightforward sources of immunity unavailable, a daring, imaginative approach was necessary. How masterly it would be if the tool of oppression could be transformed into the instrument of liberation!

A. The Doctrine Stated:

The pre-emptionists argue that the Taft-Hartley Act is a complete code of labor relations law, comprehensively governing the labor relations problems subject to federal power, and that, *therefore*, the legislatures, courts and other agencies of the several states are, with some minor exceptions, without power to act in regard to the labor relations problems of interstate employers. The pre-emptionists argue, again with exceptions presently to be noted, that state law may not be applied in interstate labor situations whether the state law be consistent or inconsistent with the national law, or even if it establishes a rule for a situation left ungoverned by the national law. Their general contention is that a state law consistent with national law is unnecessary, that a state law in conflict with national law must obviously bow, and that a state law which goes beyond, but is not in conflict with national law, may not be applied — all because Congress in enacting such a comprehensive scheme of regulation as the Taft-Hartley Act must implicitly have rejected as unsound or undesir-

able all measures not expressly set forth in the Act.⁹

The pre-emption doctrine may be restated in syllogistic form:

Major (legal) Premise: Where the Congress has regulated a field of human activity in detail, the states have no power to regulate that field (except in its strictly intra-state phases), even in a consistent, a complementary, or a supplementary way.

Minor (factual) Premise: Congress has in the Taft-Hartley Act thoroughly regulated the field of interstate labor relations.

Conclusion: The states may not regulate interstate labor relations, as such, except to the extent specifically permitted by the Taft-Hartley Act.

B. Implications of the Doctrine as Stated:

This doctrine, so impressive as stated, would have even more impressive consequences if accepted by the Supreme Court of the United States and by the state courts and legislatures. It would mean, generally speaking, that labor relations problems — representation issues, employer and union conduct in labor disputes — are to be settled in the federal system or not at all. It would mean that issues in the greater part of American labor relations are for the National Labor Relations Board — or completely non-justiciable. It would mean that if a certain form of union or employer conduct were illegal under state law, but neither privileged nor unlawful under federal law, no adjudicating agency, state or federal, would have jurisdiction to forbid the conduct, clearly unlawful though it might be.

⁹ This is believed to be a fair statement of the position taken by Mr. Mozart Ratner, NLRB Assistant General Counsel, in the N.Y.U. Fifth Annual Conference on Labor. It is the view to be gathered from the large number of cases in which labor-union attorneys have resisted state-court action. And it is the view expressed in the articles cited in note 2 *supra*.

For those who are inclined to be concerned only with basic realities, perhaps the most serious and impressive consequence of the pre-emption doctrine is that it would in very many important instances provide immunity for vicious employer and union conduct *which is expressly and directly made unlawful by both state and federal law*. For this result to accrue it would be necessary only for the National Labor Relations Board, in the exercise of its virtually unreviewable discretion,¹⁰ to decline jurisdiction in a case involving a plain violation of law. The NLRB having declined jurisdiction, the pre-emption doctrine would foreclose state action, even where such action was based on state law, common or statutory, consistent with federal law. On such a thread would pre-emptionists suspend legal rights and duties, in a nation which prides itself upon its rule of law.

Thus, to take one of the most important current labor-law issues, the pre-emptionists argue that a state court may not enjoin minority picketing for recognition where no other union has been certified.¹¹ The view of the NLRB today is that such picketing is not violative of the Taft-Hartley Act,¹² although it amounts to precisely the same kind of economic coercion of employee choice which is forbidden to employers under a section of the NLRA¹³ virtually identical to the section¹⁴ prohibiting union restraint or coercion of employees.¹⁵ But even with possible Taft-Hartley sanc-

¹⁰ *Haleston Drug Stores, Inc. v. NLRB*, 187 F.(2d) 418 (9th Cir.), cert. denied, 342 U.S. 815, 72 S.Ct. 29, 96 L.Ed. *28 (1951). But see *Joliet Contractors Ass'n v. NLRB*, 193 F.(2d) 833 (7th Cir. 1952), where the court held that the NLRB had abused its discretion in deciding not to assume jurisdiction over a plainly unlawful boycott. Cf. Comment, 50 MICH. L. REV. 899 (1952).

¹¹ Cox and Seidman, *supra* note 2, at 225-6.

¹² *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

¹³ Section 8 (a) (1), outlawing employer interference with or restraint or coercion of employees in the exercise of the right to join or not to join labor unions.

¹⁴ Section 8 (b) (1) (A), outlawing union restraint or coercion of employees in the exercise of the right to join or not to join labor unions.

tions against such coercive union conduct erased, complete immunity is not yet available; for some state courts, unembarrassed by the expertise of the National Labor Relations Board, have readily seen that such picketing flies in the face of the national policy in favor of an uncoerced choice on the part of employees. In the vanguard in this field, the New York Court of Appeals has gone so far as to assert that such picketing, being plainly in pursuit of an unlawful objective, ought to be enjoined.¹⁶ Ten years ago, that conclusion might not have been possible; the Thornhill doctrine¹⁷ might have been regarded as an insuperable bar to an injunction. Today, however, we know that picketing in pursuit of an unlawful objective may constitutionally be enjoined by the state courts.¹⁸ Hence, if unions are to maintain their now-traditional immunity to legal process, some substitute must be found. The pre-emption doctrine has been pressed into service.

The pre-emptionists themselves insist, it must be repeated, that the Taft-Hartley Act does not outlaw minority picketing for recognition, except where another union has been certified.¹⁹ Yet no pre-emptionist has as yet contended that minority picketing for recognition is in accordance with the national labor policy, which is oriented largely in terms of free employee choice. The situation then is this: While such picketing appears to be neither unlawful nor privileged under federal law, it is rather clearly in conflict with the national labor policy.²⁰ In these circumstances it would seem sensible to conclude that, in

¹⁶ Cf. *Petro, Recognition of Picketing Under the NLRA*, 2 LAB. L.J. 803 (1951).

¹⁸ *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E.(2d) 697 (1951), discussed in *Petro, State Jurisdiction to Control Recognition Picketing*, 2 LAB. L.J. 883 (1951).

¹⁷ *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

¹⁸ See note 1 *supra*.

¹⁹ Cf. *Feldblum, supra* note 2.

²⁰ Cf. *Building Service Employees International Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045 (1950); *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E.(2nd) 697 (1951).

the absence of a clear Congressional declaration to the effect that such conduct is privileged, there should be no question as to the power of the states to act. The fact is, however, that the pre-emptionists challenge the existence of this power. They say, to paraphrase one, that around the periphery of each kind of union conduct declared an unfair practice by federal law, there is an area which the states are no longer free to enter, and that, therefore, since federal law prohibits minority picketing for recognition where another union has been certified, state law may not prohibit any minority picketing.²¹ We may conclude, then, that according to the pre-emptionists, specific details of conduct which are neither outlawed nor specifically privileged by federal law are not within the state's power to regulate, if the general type of conduct has been regulated by federal law.

The pre-emptionists similarly contend that the states may not regulate conduct which has been specifically regulated by federal law, even though the state regulation be essentially similar or virtually identical to federal regulation. As an example, consider the situation where a union compels an employer to discriminate against nonunion workers. The common law in certain states declares that such coercion of discrimination is an actionable tort unless it occurs in circumstances providing legal justification.²² In some states, this justification is held lacking if the union is a "closed" one, *i.e.*, a union which arbitrarily restricts membership.²³ The same union conduct is an unfair practice under the Taft-Hartley Act, under which legislation a union may compel discrimination in employment only if it is a party to a lawful union-shop agreement, and then only

²¹ Cox and Seidman, *supra* note 2, at 223.

²² Cf. *Clark v. Curtis*, 297 N.Y. 1014, 80 N.E.(2d) 536 (1948); *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.(2d) 461 (Sup.Ct. 1950).

²³ Cf. *Dotson v. International Alliance of Theatrical Stage Employees*, 34 Cal.(2d) 362, 210 P.(2d) 5 (1949); *James v. Marinship Corp.*, 25 Cal.(2d) 721, 155 P.(2d) 329 (1944).

in regard to workers who have refused to pay standard dues and initiation fees.²⁴ Notwithstanding the virtual identity of federal and state law in this area, and the more effective prosecution of national labor policy which participation by state courts would tend to insure, the pre-emptionists insist upon a complete ouster of state jurisdiction. They urge, as a general rule, that resort must not be had to the state courts under state law even though the ultimate result of state action would be essentially the same as action under the federal law.²⁵

In summary, then, the pre-emptionists contend for an ouster of state jurisdiction both where state law is essentially similar to federal law, and where state law, while consistent with federal policy, goes beyond it to regulate details of certain conduct when such details are currently held to be unregulated by federal law. The effect of the pre-emption doctrine, viewed starkly, is to leave the enforcement of the national labor policy completely in the hands of the National Labor Relations Board. This point cannot be over-emphasized. The pre-emption doctrine, as argued in labor relations today, is really not concerned with substantive law, or with the enforcement of national labor policy, or even with the abiding problems inherent in securing a due accommodation between the nation and the states. Indeed, all these considerations, which ought to be paramount, are rejected. The fact is that an attempt is being made to secure for the National Labor Relations Board exclusive authority in the labor relations field. Owing to the manifest limitations on NLRB activity, the result of a decision favoring the pre-emptionists will mean, not enforcement of the congressionally declared national labor policy, but enforcement of National Labor Relations Board

²⁴ Sections 8 (a) (3) and 8 (b) (2) of the National Labor Relations Act, as amended.

²⁵ For qualified acceptance of this argument by the New York Court of Appeals, see *Costaro v. Simons*, 302 N.Y. 318, 98 N.E.(2d) 454 (1951).

policy. Today supremacy of National Labor Relations Board policy may mean virtual immunity for unlawful union conduct in many instances. Tomorrow it may mean similar immunity for equally unlawful employer conduct. Viewed broadly, then, the pre-emption issue goes far beyond the momentary advantage of union or employer. The vital point is far more important. A victory for the pre-emption doctrine in labor relations means the subordination of law, of justice and of effective legal procedure to administrative discretion.²⁶ As usual, the founding fathers knew what they were about when they insisted that the judicial power be vested in judges who possessed permanent tenure and irreducible salaries.²⁷ The pre-emptionists, by and large, are the same persons who favor the proliferation of administrative agencies to exercise judicial

²⁶ When the President proposed to abolish the office of the independent General Counsel of the National Labor Relations Board, in the Spring of 1950, one of the principal arguments made in support of the proposal was that the division of authority between the Board and the General Counsel created much confusion. However, the General Counsel said before a Senate Committee which was considering the President's proposal that the confusion emanated, not from the divided authority, but from the NLRB's own unpredictable and inconsistent decisions on assumption of jurisdiction. After a careful study of NLRB decisions, said the General Counsel, he found "no one policy but many policies utterly inconsistent with one another." "Some of these policies," he asserted, "extend the Board's jurisdiction far beyond the area covered by the Board under the Wagner Act. Others restrict the area covered under that Act. What is policy one month may not be policy the next month. Policies are inconsistent between different industries and within the same industry." The General Counsel cited a large number of NLRB decisions which, he said, demonstrated the force of his statement. See the statement by Robert N. Denham, General Counsel of the NLRB in *Hearings before Senate Committee on Expenditures in the Executive Departments on President's Reorganization Plan No. 12*, 81st Cong., 2d Sess. (1950). Similar conclusions have been stated and documented by the Chairman of the New York State Labor Relations Board, Keith Lorenz. See his address at N.Y.U. Fifth Annual Conference on Labor. See also Lorenz, *Conflict of Jurisdiction between National and New York State Labor Relations Boards*, 5 *INDUST. & LAB. REL. REV.* 411 (1952). For a brief account of the basic features of the dispute between the NLRB and its General Counsel see the discussion in *Administrative Discretion v. Rule of Law*, 1 *LAB. L.J.* 579 (1950), and the excellent note in 50 *MICH. L. REV.* 899 (1952), which also documents the charge that the NLRB, not its original (independent) General Counsel, is responsible for existing confusion concerning the coverage of the Act. For an example of the use made by the NLRB of its now virtually unreviewable discretion to refuse to take jurisdiction over unfair practices affecting commerce, see *Joliet Contractors Ass'n v. NLRB*, 193 F.(2d) 833 (7th Cir. 1952).

²⁷ U.S. CONST. Art. III, § 1.

powers even though the personnel of those agencies do not possess the characteristics of office clearly set forth in the Constitution for judicial officers. It is perhaps a logical step, once having encouraged the growth of such agencies, to completely subordinate law to their discretion.²⁸

II.

The Fallacies of the Pre-Emption Doctrine as Stated A. *The Major Premise and Houston v. Moore.*²⁹

The Honorable Bushrod Washington, Associate Justice on John Marshall's Court, commanded far less sentiment, it would seem, than did his magnificent uncle. Of the seven Justices who made up the Court when *Houston v. Moore* was decided, with Justice Washington writing the majority opinion, two dissented and the concurring justices dissociated themselves from Washington's reasoning.³⁰ In these circumstances, only the holding in *Houston v. Moore* would seem to be important as a guide to the command of the Constitution in matters of federal-state relations; the fact that all the Justices rejected Washington's reasoning suggests that the language of his opinion may be accepted or rejected more readily. Not so for the pre-emptionists of today, however, who argue the reverse. They wish to forget the holding of *Houston v. Moore* — for it is squarely against them — and to inflate the importance of Justice Washington's lonely reasoning.

The pre-emption doctrine is put forth by its current proponents as a substitute for the concurrent-jurisdiction doc-

²⁸ For a scholarly survey of the literature dealing with the underlying problem, see Schwartz, *Executive Power and the Disappearance of Law*, 21 N.Y.U.L.Q. REV. 487 (1946).

²⁹ 5 Wheat. 1, 5 L.Ed. 19 (U.S. 1820).

³⁰ Mr. Justice Washington's opinion concludes as follows: "Two of the judges are of opinion that the law in question is unconstitutional, and that the judgment below ought to be reversed.

"The other judges are of opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion." 5 L.Ed. at 26.

trine — the doctrine that state law may not be applied in interstate situations *only* where the state law is essentially inconsistent with national law. As we shall see later in this discussion, no issue is taken with the pre-emption doctrine where it is rooted in and organically unfolds from the basic constitutional principle of federal supremacy in the field of commerce among the several states.³¹ On the contrary, we positively urge an ouster of state law which conflicts with federal law. But the pre-emptionists insist that conflict is not the determinative consideration; they wish to oust state action even where it enforces the national labor policy. The issue, therefore, is whether or not the current pre-emptionists are correct in positing as their basic premise that where Congress has regulated a field in some detail state law must bow without regard to whether it be consistent, supplementary, or conflicting.

Justice Washington's opinion in *Houston v. Moore* is perhaps the most frequently quoted authority for this proposition. But only certain parts of the opinion are quoted, while others, which we shall presently note, are not mentioned. The pre-emptionists are fond of quoting the following language:³²

³¹ "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. Art. VI, cl. 2. No one has ever seriously suggested that a theory of general pre-emption can be pieced out of this provision. In fact, careful reading of the provision and some acquaintance with the facts in 1787 should convince most people that the framers accepted freely the possibility that national law would be enforced to a considerable extent in state courts. There was indeed doubt as to whether there would be a complete federal judicial system for many years after 1787, and in this connection it should be noted that nothing in the Constitution commanded the Congress to set up a federal judiciary at a level below the Supreme Court. Thus the framers, unlike the doctrinaire pre-emptionists of today, and in line with their usual good sense, gladly accepted the possibility of participation by the states in the enforcement of national policy. They drew the line, in the Supremacy Clause, as we do here, at the point where state law would conflict with federal law. They envisioned the Supreme Court as the agency which would ensure consistency between state and federal action, again as we do in the present paper.

³² *Houston v. Moore*, 5 Wheat. 1, 5 L.Ed. 19, 24 (U.S. 1820).

To subject them [the people] to the operation of two laws upon the subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances the only proper one. If the other legislature imposes a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

. . . I consider [it] a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

Notwithstanding the Honorable Bushrod Washington, however, the doctrine which the foregoing language terms "novel and unconstitutional" was probably accepted by the Justices sitting with Washington. To use his own words, they agreed "that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion."³³ But, more startling than that, an analysis of the facts of *Houston v. Moore*, the holding and the whole of Justice Washington's opinion will indicate that Washington himself, when all was said and done, accepted as sound what he was pleased at one point in the opinion to call a "novel and unconstitutional" doctrine.

And what was the actual judgment in the case? The issue in *Houston v. Moore* was whether or not the State of

³³ *Id.*, 5 L.Ed. at 26.

Pennsylvania's provision for court-martial of any militia-man who disobeyed the federal draft law then in effect could constitutionally be applied in view of the fact that it duplicated and went slightly beyond (but was not inconsistent with) similar provisions of the existing federal law. In view of the language which we have just quoted from Justice Washington's opinion, one would naturally expect to learn that the Supreme Court invalidated the Pennsylvania court-martial procedure. *Nothing could be further from the truth.* In fact, the United States Supreme Court, over the dissent of two justices who accepted arguments which the current pre-emptionists have revived, *upheld* the Pennsylvania law.

This contrast between the holding of *Houston v. Moore* and the parts of Washington's opinion already quoted may explain why Washington's colleagues of the majority did not concur "in all respects" with his reasoning. However, they could concur with such of Washington's reasoning as did not contradict the actual holding, and there is some reasoning of that kind. Thus, in answer to the objection that upholding the Pennsylvania law "would either oust the jurisdiction of the United States court-martial or might subject the accused to be twice tried for the same offense"³⁴ Justice Washington replied:³⁵

. . . if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States.

Again, when it was argued that upholding the Pennsylvania law might allow the Governor of that state to pardon violators and thus conceivably defeat the federal policy,

³⁴ *Ibid.*

³⁵ *Ibid.*

Justice Washington first reserved his doubts as to the validity of such a pardon, and then, significantly, went on to say that if the governor could pardon, "this would only furnish a reason why Congress should vest the jurisdiction in these cases exclusively in a court-martial acting under the authority of the United States."³⁶

The truth is, as further excerpts from Washington's opinion demonstrate conclusively, that *Hquston v. Moore* stands, not for automatic pre-emption whenever Congress has regulated a subject in detail, but for pre-emption only where Congress has expressly and conclusively provided for an ouster of concurrent state jurisdiction or where the state law is actually or potentially in conflict with federal law. With this formulation of the pre-emption doctrine, no issue is taken here.³⁷ It is the current pre-emptionists in the labor field who as a matter of fact reject the holding of *Houston v. Moore* and the position taken by Justice Washington in the concluding paragraph of his opinion:³⁸

Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia-man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere, or until the state of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the court coram non judice, and the judgment of the Supreme Court of Pennsylvania erroneous on these grounds.

As currently argued in the labor relations field, then, the

³⁶ *Ibid.*

³⁷ See note 31 *supra*.

³⁸ 5 Wheat. 1, 5 L.Ed. 19, 26 (U.S. 1820).

pre-emption doctrine is far from persuasive, at least to the extent that it rests upon such cases as *Houston v. Moore*. The basic flaw in the whole doctrine lies in a slippery misstatement of the first premise. So far as the Constitution of the United States is concerned, state law is *expressly* invalidated only where it is in conflict with federal law; and it is *implicitly* invalidated only where it places the kinds of burdens upon interstate commerce with which the framers of the Constitution were so whole-heartedly pre-occupied. The pre-emptionists may validly rely upon neither the Constitution nor *Houston v. Moore* for the proposition that the mere detailed regulation of a given field automatically, and without more, ousts consistent state regulation. *Houston v. Moore* very clearly, and a host of other Supreme Court decisions argumentatively, are precedents to the contrary. As Justice Black has recently put it, the Supreme Court:³⁹

. . . has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

B. The Minor Premise and the Fragmentary Character of the Taft-Hartley Act:

Even were we to accept the major premise of the pre-emptionists, their conclusion would not follow, for the middle premise is factually inaccurate. The Taft-Hartley Act is not and was never meant to be an exhaustive regulation of all phases of the labor relations field. Furthermore, and this is a matter of the most profound significance, the

³⁹ *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 93 L.Ed. 212 (1949). For an exhaustive review of the precedents, see Justice Frankfurter's dissenting opinion in *Hill v. Florida*, 325 U.S. 538, 547-61, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945). We shall discuss this matter and the applicable precedents much more fully in Part III, *infra*.

"field" of labor relations is so inherently indefinable, since labor law merges with and overlaps so many other "fields," that the concept of general pre-emption shows itself to be an extremely troublesome over-simplification when any conscientious effort is made to apply it. As a result the pre-emptionists either fall into unpredictable error, as Messrs. Cox and Seidman did in suggesting that state laws forbidding strikes and providing for compulsory arbitration of public-utility labor disputes would not be invalidated by the Supreme Court,⁴⁰ or they find it necessary, as we shall see, to resort to numerous *ad hoc* exceptions in order to cover situations where federal pre-emption is simply unthinkable.

Labor relations problems, the substance of the labor-law "field," reach out into most fields of law and human conduct known to man. Almost all of the relationships between man and man which have been brought into courts of law are present in labor relations, from simple assault and battery to complicated contractual arrangements, from the suppression of free comment and accepted political and social rights to agreements in restraint of trade. When a union man's right to testify against a legislative proposal is countered by an expulsion from his union, which is in favor of the proposal,⁴¹ we may, if we wish, view the case from the point of view of civil rights. But if the union expels a man because he is against the union's collective-bargaining policy, how should we view the case? Is this a labor relations problem? Does it belong to the labor-law "field"? If so, how is it that the "exhaustive" national regulation of labor relations problems, which is what the pre-emptionists

⁴⁰ Cox and Seidman, *supra* note 2, at 240-41. The Supreme Court has recently held that the states may not outlaw peacefully conducted strikes for higher wages in any industry or firm subject to federal law. *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951), hereinafter referred to as the *Wisconsin* or the *Wisconsin Public Utilities* case.

⁴¹ Cf. *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 Atl. 70 (1921).

call the Taft-Hartley Act, does not directly or indirectly deal with the problem? If the Taft-Hartley Act pre-empts the labor relations field, should not the pre-emptionists insist that no state may outlaw expulsions arising from disagreements on collective-bargaining policies or other "internal" union matters?⁴² And this, even though there is nothing in the Taft-Hartley Act even remotely bearing on the problem?

The pre-emptionists rejoin here with one of their *ad hoc* exceptions. They interpose that the Act has explicitly made itself inapplicable to the "field" of internal union affairs. In support of their position they sometimes advance the proviso to Section 8(b) (1) (A), which states that "*this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*" [Emphasis added.]⁴³ But the italicized words provide the key to the inadequacy of this pre-emptionist makeshift. The draftsmen of the Act knew full well that *other* paragraphs of the Act would to some extent "impair the right of a labor organization to prescribe its own rules." Thus, everyone concerned with the law relating to internal union affairs knows that three general solutions have been advanced in regard to the troublesome problems of admission and expulsion of union members—the basic "internal union

⁴² Here and there a court gets enthusiastic over the pre-emption doctrine and proceeds to an entirely unsound result. Cf. *Born v. Cease*, 101 F. Supp. 473 (D. Alaska 1951), where the court dismissed a suit by a union member for reinstatement to union membership based on charges of wrongful expulsion. Dismissal was predicated on the plainly erroneous assumption that the matter was "covered" by the Taft-Hartley Act and that, therefore, only the NLRB had jurisdiction. But nothing in the Act makes any expulsion unlawful, and nothing in the Act provides the remedy of reinstatement to union membership. Cf. also *NLRB v. Capital Service, Inc.*, 6 CCH LAB. LAW REP. (4th ed.) ¶ 67,010 (S.D. Cal. 1952).

⁴³ This was the position taken by NLRB Assistant General Counsel Ratner at the N.Y.U. Fifth Annual Conference on Labor. But see Smith, *supra* note 2, at 623-24.

affairs" problem.⁴⁴ Some have argued that the common law is doing tolerably well in controlling abuses of union power over their members; others have suggested that an administrative agency be given the job; still others have argued that the most socially desirable, the simplest and the most effective device is simply to reduce union power over employees by outlawing the closed shop, thus minimizing the necessity of thorough, detailed regulation of union membership practices. The Taft-Hartley Act of course adopts the latter course.⁴⁵ Only those too unsophisticated to realize that high taxes, credit controls and conservative fiscal policies are more effective inflation deterrents than price and wage-fixing will fail to see that the approach of the Taft-Hartley Act is a more thoroughgoing regulation of internal union affairs and even membership policies than the other direct regulations which have been proposed. But if this is not enough to point up the fragility of the pre-emptionist makeshift, we need only refer to the Taft-Hartley requirement that all union officers file non-Communist affidavits as a prerequisite to use of the National Labor Relations Act⁴⁶ and to the outlawing of excessive and discriminatory union initiation fees.⁴⁷ It is impossible to see how anyone can seriously argue, in view of these provisions, that the Taft-Hartley Act consciously and explicitly avoided all regulation of internal union affairs. Yet the pre-emptionists do make that argument. For they must. Otherwise, in order to be coherent and consistent, they must assert that all the admission and expulsion and other internal union-affairs cases being heard

⁴⁴ For discussion of the various proposals, see Note, *The Power of Trade Unions to Discipline Their Members*, 96 U. of PA. L. REV. 537 (1948). See generally De Maio, *Expulsion, Unions and the Courts* in N.Y.U. FOURTH ANNUAL CONFERENCE ON LABOR 377 (1951); Summers, *Disciplinary Powers of Unions*, 3 INDUST. & LAB. REL. REV. 483 (1950), and *Disciplinary Procedures of Unions*, 4 INDUST. & LAB. REL. REV. 15 (1950).

⁴⁵ Sections 8 (a) (3) and 8 (b) (2) of the NLRA as amended. Cf. Note, 96 U. of PA. L. REV. 537 (1948).

⁴⁶ Sections 9 (f), (g) and (h) of the NLRA, as amended.

⁴⁷ Section 8 (b) (5).

by the state and federal common-law courts are nonjusticiable.⁴⁸ And this is of course plainly unthinkable. The truth is that the framers of the Taft-Hartley Act, while conscious of having entered into the regulation of internal union affairs, entered in only a fragmentary way, with no intention of ousting the pre-existing jurisdiction of the common-law courts. And what is true here is true, with one or two exceptions, in the whole area of what is known ambiguously as "labor law."

Perhaps no kinds of human conduct and related legal doctrine are more similar to labor relations conduct and doctrine than those falling within the "field" which is generally called "trade regulation." In fact, trade regulation and labor law merge into each other factually, analytically and doctrinally.⁴⁹ In the Clayton⁵⁰ and Norris-LaGuardia⁵¹ Acts, the Congress tried to legislate the similarities out of existence; and the Supreme Court, which can do many things that Congress cannot, actually succeeded, in the

⁴⁸ For some idea of the number of cases involved, see the present writer's articles in the 1949-1950 *Survey of New York Law*, 25 N.Y.U. L. REV. 1044, 1053-64 (1950); and the 1950 *ANNUAL SURVEY OF AMERICAN LAW* 393-401 (1951).

⁴⁹ A random selection of teaching materials on "labor law" will almost always turn up either a chapter or a substantial section devoted to laws regulating trade. See, e.g., GREGORY, *LABOR LAW: CASES, MATERIALS, AND COMMENTS* Ch. X (1948); HANDLER AND HAYS, *CASES ON LABOR LAW* 700-717 (1950); LANDIS AND MANOFF, *CASES ON LABOR LAW* Ch. VII (2d ed. 1942); SMITH, *LABOR LAW: CASES AND MATERIALS* 572-612 (1950). The converse holds in teaching materials on "trade regulations." See, e.g., SCHWARTZ, *FREE ENTERPRISE AND ECONOMIC ORGANIZATION* Ch. X (1952). Before the distinctions of the 1930's were drawn, it seemed to be generally understood that labor relations, at least in the group sense, were a part of the human conduct covered by laws regulating trade. See the excellent collection of materials in HANDLER, *CASES AND MATERIALS ON TRADE REGULATION* Ch. I (2d ed. 1951), and see *People v. Fisher*, 14 Wend. 10 (N.Y. 1835).

⁵⁰ Section 6 of the Clayton Act hopefully declared that "the labor of a human being is not a commodity or article of commerce," disregarding the *real* distinction between human beings themselves and their labor. The latter is continually bought and sold, like every article of commerce, especially since unions have undertaken to bargain collectively for numerous men, thus heightening the impersonal elements of the labor transaction. 38 STAT. 731 (1914), 15 U.S.C. § 17 (1946).

⁵¹ 47 STAT. 70 (1932), 29 U.S.C. § 101 (1946).

Hutcheson case,⁵² where Congress had failed.⁵³ The Court held that labor unions, acting alone, cannot be guilty of restraints of trade.⁵⁴ But now, without expressly overruling the Supreme Court, the Congress has made directly unlawful a considerable number of the types of union conduct which had previously been held unlawful as restraints of trade.⁵⁵ Whether a secondary strike is unlawful as an unfair practice, on the one hand, or as a restraint of trade, on the other, makes no difference in the real world. And this is especially true when the underlying sentiment for declaring the conduct unlawful is in both instances the same. Whether secondary strikes be held unlawful restraints of trade or unfair labor practices, the ultimate source of the legal sanction is the healthy social antagonism toward the "ganging-up" which both business cartels and labor-union combinations manifest.⁵⁶

So, in any analysis which goes beyond the plainly superficial, the inherent identity of laws regulating trade and at least some aspects of labor law must be recognized. The "field" of labor law and the "field" of trade regulation have many pastures in common. If the pre-emptionists are to be consistent and coherent, therefore, they are under an obligation to argue that no state may outlaw the kinds of labor action which are declared to be unfair labor practices under Section 8(b) (4) of the Taft-Hartley Act,

⁵² *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L. Ed. 788 (1941), holding that labor unions cannot violate the federal antitrust laws, no matter what action they take, except when they combine with business organizations.

⁵³ *Cf. Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921), holding that Congress had not in the Clayton Act, *supra* note 50, immunized labor unions against prosecution under the Sherman Act, 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946).

⁵⁴ *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941).

⁵⁵ Section 8 (b) (4) of the NLRA, as amended. For a case showing how labor action presently outlawed by § 8 (b) (4) used to be prohibited by the Sherman Act, see note 53 *supra*.

⁵⁶ This sentiment is never made explicit in statutes or decisions expressly outlawing secondary action by unions, but there would seem to be no other explanation for such statutes or decisions.

even though the state outlawry may be contained in a statute generally forbidding restraints of trade by either businessmen or unions.⁵⁷ Here again, however, because of the immanent weakness of the pre-emption doctrine — because it is almost unthinkable, especially in view of a number of Supreme Court decisions upholding state-court injunctions against union restraints of trade,⁵⁸ to declare that such state laws are precluded by the Taft-Hartley Act — the pre-emptionists are driven to another makeshift exception. They manufacture, without any basis in reason or authority, the proposition that Congress has pre-empted only the labor-law “field,” not the “field” of trade regulation; and therefore, they conclude, the states may continue to outlaw secondary labor action under their general statutes in restraint of trade, because those statutes are not “labor” laws.⁵⁹ Surely this is a plain *tour de force*. And the strained artificiality of the fabrication appears even more forcefully from a collateral line of analysis. As is well known, the Federal Government has a comprehensive body of trade regulations, embodied in the Sherman Act,⁶⁰ the Clayton Act,⁶¹ the Federal Trade Commission Act,⁶² and a host of less well-known statutes⁶³ — all more or less administered by the Federal Trade Commission. If the Taft-Hartley Act pre-emptes the labor-law “field,” why has no one ever argued that the common-law or statutory juris-

⁵⁷ Cf. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949), where the Supreme Court upheld the constitutionality, over free-speech objections, of the application of a general antitrust statute to secondary picketing by a labor union.

⁵⁸ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949); *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942).

⁵⁹ This inference is drawn from the Ratner paper read at the N.Y.U. Fifth Annual Conference on Labor and from the Cox and Seidman article, *supra* note 2, at 240, 242, although the position is stated vaguely in both cases. See further note 68 *infra*.

⁶⁰ 26 STAT. 209 (1890), 15 U.S.C. §§ 1-7 (1946).

⁶¹ 38 STAT. 730 (1914), 15 U.S.C. §§ 12 *et seq.* (1946).

⁶² 38 STAT. 717 (1914), 15 U.S.C. § 41 (1946).

⁶³ For a list of federal antitrust laws, laws regulating trade and exceptions to such laws, see OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 61-69 (1948). Note that the list was eight pages long in 1948.

diction of state courts over unfair trade practices has been pre-empted by the federal trade-regulation program? And where does all this leave the pre-emptionist argument that states may regulate under *antitrust* laws precisely the same kind of conduct which may not be touched by *labor* laws?

Once again the only satisfactory conclusion is that the pre-emption doctrine—as argued by the current pre-emptionists—is a confused and artificial set of *ad hoc* propositions.⁶⁴ Once again it becomes clear that both the major and the minor premises of the current pre-emption argument are unsound, legally and factually, and that they can lead only to greater confusion. The basic trouble is that the pre-emption doctrine, as argued today, rests on an arbitrary and untenable definition of the labor-law “field,” necessitated by the clearly fragmentary character of existing national labor legislation.

The foregoing kind of analysis of the current pre-emption doctrine could be continued almost indefinitely. Is not labor arbitration a part of the labor-law “field”? If so, does the complete omission of any regulation of the arbitration process in the Taft-Hartley Act mean that the whole thriving industry of labor arbitration is somehow suspect? Or does the fragmentary attention to “feather-bedding” in Section 8(b) (6) of the Taft-Hartley Act mean that such common-law developments as the decisions of the New York courts in *Opera on Tour*⁶⁵ and the recent

⁶⁴ Thus Cox and Seidman, who straightforwardly recognize “that pre-emption in labor relations cannot rest on Congressional intent, *supra* note 2, at 224, 226, *et seq.*,” insist that as a matter of policy practically all state action should be precluded, *ibid.* Then they urge, nevertheless, that national law may be regarded as not privileging “a limited number of [union] objectives so contrary to accepted standards as to warrant administrative condemnation.” *Id.* at 239. In short, it would seem that these writers would have the scope of labor immunity vary with their own feelings, or the feelings of the NLRB, as to permissible union conduct. One may question the good sense, if not the political maturity, of proposals such as this, which would rank the responsibilities and powers of the states so low, especially where it is virtually admitted that the present legal structure does not establish that ranking.

⁶⁵ *Opera on Tour, Inc., v. Weber*, 285 N.Y. 348, 34 N.E.(2d) 349 (1941).

*Dalzell*⁶⁶ case must cease? On the basis of the prima-facie tort theory a whole structure of common law for concerted labor action has been built. Is this structure to be torn down or arrested in its present stage simply because the Taft-Hartley Act has spoken — and consistently with the common law, at that — on some phases? Or will the pre-emptionists make an exception here, as they have done in the “fields” of internal union affairs and antitrust laws, because, after all, tort law represents as identifiable a “field” as antitrust law. Finally, why is it that the pre-emptionists never object to state-court injunctions against picket-line violence when the Taft-Hartley Act regulates that form of traditional union conduct as thoroughly and pervasively as it regulates anything?⁶⁷ Do the pre-emptionists seriously maintain either that picket-line violence does not fall naturally within the labor-relations “field” or that, if it does, there is some inherent distinction between laws against violence and laws forbidding other kinds of anti-social conduct?⁶⁸

⁶⁶ *Dalzell Towing Co. v. United Marine Division, I.L.A.*, 279 App. Div. 212, 108 N.Y.S.(2d) 912 (1st Dep’t 1951) (injunction issued against a strike to prevent the employer from changing to three-shift operation). See also 6 CCH LAB. LAW REP. (4th ed.) ¶ 66,891 (1951).

⁶⁷ *Cf. Erwin Mills, Inc. v. Textile Workers Union of America, C.I.O.*, 234 N.C. 321, 67 S.E.(2d) 372 (1951), where, over objections by the union counsel on pre-emption grounds, the state court upheld an injunction against violent picketing. The significance of this case in the light of the current pre-emptionist movement is discussed in Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LAB. L.J. 3 (1952).

⁶⁸ Cox and Seidman, *supra* note 2, at 236, contend that, notwithstanding the Taft-Hartley ban on violent picketing, state laws prohibiting the same action should continue to have application in interstate cases: “Congressional regulation as part of a labor program,” they suggest, “can scarcely be taken to show that Congress meant to render the states powerless to deal with offences against public order which are forbidden under laws of general application.” Of course it is impossible on any sensible basis to disagree with this suggestion. The only trouble is that it applies equally to all state laws, except, perhaps, the thoroughgoing, broad, labor relations type of state law administered by an agency like the National Labor Relations Board. Labor action is prohibited under the prima-facie tort theory, for example, not as a part of a special scheme of labor relations laws, but simply because it is felt to be tortious under “laws of general application,” to use the phrase just quoted from Cox and Seidman. So too with many other state laws, for example state antitrust laws, which are applied to labor-union conduct. Thus the approval of state laws prohibiting picket-line violence appears once more as a concession by the pre-emptionists which shows the basic deficiencies of the whole position.

C. Summary and Restatement of the Problem:

It goes pretty much without saying that where the major and minor premises of an argument are both unsound, the ultimate proposition advanced can be sound only accidentally. The current pre-emption doctrine begins with the premise that the mere existence of detailed federal regulation of an area of human conduct, without more, necessarily precludes all state regulation in that area, regardless of the consistency or inconsistency of the state regulation with the federal regulation. We have seen that the case principally relied upon for that premise, *Houston v. Moore*,⁶⁹ actually stands for the precise contrary. The second—the minor, or factual—premise of the pre-emption argument is that the Taft-Hartley Act amounts to a comprehensive, detailed, even exhaustive code of regulations for the “field” of labor relations. The fallacies in this assumption are both numerous and slippery, but the fundamental fallacy lies in the inconsistent, artificial delimitation of the “field” of labor law or labor relations. No matter how that “field” is defined—whether to include or to exclude violence, combinations in restraint of trade, arbitration and internal union affairs, or whether the definition be in terms of fields of legal doctrine, such as trade regulation, tort law, the law of unincorporated associations, etc.—the contention that the Taft-Hartley Act represents an exhaustive code of regulations, or was meant to be such a code, simply does not hang together. The fact that the pre-emptionists have themselves found it necessary to resort to a number of exceptions to their general position in regard to the comprehensiveness and exhaustiveness of the Taft-Hartley Act strongly suggests that the general position is extremely dubious.

Like most legal arguments, however, there is a trace of solidity and strength in the pre-emption doctrine. The

⁶⁹ 5 Wheat. 1, 5 L.Ed. 19 (U.S. 1820).

doctrine becomes essentially valid when it is developed on the basis of the Supremacy Clause of the Constitution.⁷⁰ More than that, it becomes a vital principle around which a number of extremely important policy considerations and practical factors naturally cluster. Thus, when the principle of federal supremacy is emphasized, and when it is accepted that state action in conflict with federal law must accordingly bow, attention is focused on the most fruitful point, in terms of effective enforcement of national labor policy. Energy is directed then, not to the empty, provoking project of frustrating state action for the mere sake of frustration, but to the more creative job of making a place for the participation of state instrumentalities in the effective enforcement of a uniform national labor policy. One need not then say to the states that they must become inert, for no good reason at all, and despite the genuine sentiment which may lie behind the state action. And it is then not necessary to bludgeon in a heavy-handed and indiscriminating way the diverse approaches which may have grown to deal with the abiding problems inherent in concerted action by labor organizations. As a practical matter, too, it is relatively easy to convince state authorities that action by them which is inconsistent with clear national policy can be tolerated on grounds of neither expediency nor justice; but it is most difficult to convince conscientious state authorities that they must stand aside, offering no relief to the victims of unlawful conduct, especially when the enforced aloofness is the product of nothing more than a naked insistence on the exclusive and paramount power of a federal administrative agency.⁷¹

All this is not to argue that state judicial and adminis-

⁷⁰ See note 31 *supra*.

⁷¹ One of the most deplorable consequences which might be expected from acceptance of the general pre-emption doctrine by the Supreme Court would be a situation like that prevailing among state courts in picketing cases after the loose and general association made between picketing and free speech in *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Some courts simply disregarded *Thornhill*; some gave it more

trative agencies generally have concurrent jurisdiction over the unfair labor practices defined in the Taft-Hartley Act. The situation is more complicated than that. To this point the argument has been designed only to call attention to the fallacies and oversimplifications of the pre-emption doctrine as currently advanced, and to establish a context for serious analysis of the degree to which the existing legal structure — the Constitution, the Taft-Hartley Act and the relevant Supreme Court precedents — permits of or forbids participation of state authorities in the enforcement and development of the national labor policy. To this matter we now turn.

III.

The Area of Permissible and Desirable State Participation

A. Conflicting State Law:

Where a state law is in conflict with federal law, obviously the state law must bow. The Supremacy Clause of the Constitution is definitive on this point. Thus the Supreme Court has held that a state statute which provides for a forfeiture of rights clearly granted by a federal statute and lying at the heart of national policy cannot be enforced, whether the forfeiture be of rights to bargain collectively⁷² or to engage in a peacefully conducted strike for higher wages.⁷³ With these cases there can be no real quarrel. Promotion of collective bargaining by duly authorized unions is *the* central feature of current federal labor relations policy, and the right to engage in a peacefully

weight than the Supreme Court itself was later to give it; others scarcely knew what to make of it, and were understandably belligerent. Pretty much the same sort of undesirable reactions might be expected under general pre-emption, especially in view of the eccentric exceptions already made by the pre-emptionists themselves. Cf. Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 2 LAB. L.J. 355 (1951).

⁷² *Hill v. Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945).

⁷³ *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951); *International Union of United Automobile Workers v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950).

and otherwise lawfully conducted strike for higher wages or for any other lawful objective is of only slightly inferior stature. The most important case in point at this juncture is probably the *Wisconsin Public Utilities* case,⁷⁴ where the Supreme Court held unconstitutional a Wisconsin statute outlawing strikes and substituting compulsory arbitration in public-utilities labor disputes.⁷⁵ The pre-emptionists are fond of citing this case as the one which "establishes" their doctrine of complete federal pre-emption in the field of labor relations. Of course it does no such thing. At most, this case and its predecessor, *O'Brien*,⁷⁶ establish the practical *fact* that any state regulation of a peaceably conducted strike for higher wages is bound to conflict with or unnecessarily duplicate the thoroughgoing and extensive federal regulation of such strikes.⁷⁷ On the narrowest construction, the case stands only for the completely indisputable proposition that a state law which *forbids* a peaceful strike for higher wages by employees under federal jurisdiction must bow because of its obvious conflict with the federal law's guarantee of the right to engage in such strikes.⁷⁸ There is much pre-emption language in the case, but the import of this language vanishes upon careful ex-

⁷⁴ *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951).

⁷⁵ WIS. STAT. c. 111, §§ 50-65 (1951).

⁷⁶ *International Union of United Automobile Workers v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950), holding unconstitutional a Michigan statute which established pre-strike procedures at variance with the NLRA generally and particularly with the procedures established in § 8(d) of the NLRA. That decision, too, contains pre-emption language, but major attention was given to the actual conflicts between the state and federal law. Thus the analysis of the *Wisconsin* case, in the text above, applies equally to the *O'Brien* case.

⁷⁷ The *Wisconsin* decision carefully sets forth the extensive, almost exhaustive, regulations of the Taft-Hartley Act in connection with peacefully conducted strikes for higher wages. *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 389-90, 71 S.Ct. 359, 95 L.Ed. 364 (1951).

⁷⁸ *Id.*, 340 U.S. at 398.

amination of the authority upon which it rests.⁷⁹ Furthermore, simple intelligence still commands that the general language of an opinion be read in the light of the facts of the case and the issues as seen by the Court. "We," the Chief Justice carefully pointed out, "deal only with the question of conflicting federal legislation as we have found that issue dispositive. . . ."⁸⁰ On still another approach, such pre-emption language as the case contains is entirely justified in the light of the conduct in question — a lawfully conducted strike for higher wages. For the fact is that regulation of this narrow type of human activity by the federal government *is* complete; it *has* literally been pre-empted. Thus there is no quarrel here with the statement made in *O'Brien* and repeated in the *Wisconsin* case: "None of these sections [of the Taft-Hartley Act] can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."⁸¹ The "this" in the last sentence clearly refers to "regulation of peaceful strikes for higher wages." Unlike the pre-emptionists, the Supreme Court observes moderation in the use of such vague terms

⁷⁹ *E.g.*, "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned'. . . ." *Id.*, 340 U.S. at 397-98. The Court is quoting here from H.R. REP. No. 245, 80th Cong., 1st Sess. 44 (1947). The quotation is not persuasive as an argument for pre-emption by the Taft-Hartley Act. It was written in connection with a bill which never became law; moreover, a bill which had very little to do with the contours of the law which ultimately passed. The House Bill, H.R. 3020, went far, far beyond the Senate Bill, S. 1126, whose structure and approach were ultimately passed in the Taft-Hartley Act. In addition to all the features of the Taft-Hartley Act, H.R. 3020 would have abolished the NLRB [§3], outlawed "monopolistic" strikes and industry-wide strikes [§ 12 (a) (3)], detailed appropriate subjects of collective bargaining and the procedure of collective bargaining [§ 2 (11)], regulated in detail the internal affairs of unions [§ 7 (b)], and made exhaustive provision for so many other matters not covered by the Taft-Hartley Act that we do not have space here even to list them. It is out of order, therefore, to attribute pre-emption to the Taft-Hartley Act on the basis of language used to describe a far more thoroughgoing bill which never became law.

⁸⁰ *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 388-89, 71 S.Ct. 359, 95 L.Ed. 364 (1951).

⁸¹ *Id.*, 340 U.S. at 390.

as "field." When it says "field" it means *the* field which it has defined with precision.

It makes little difference, then, whether we say that regulation of peaceful strikes for higher wages has been pre-empted by the Federal Government or that state regulation of such strikes must bow under the Supremacy Clause because it conflicts with federal regulation. The results and even the basic thinking in both cases are the same. As stated earlier in this paper, the proper conception of the pre-emption doctrine is precisely that which ousts state action only when it presently or potentially conflicts with federal action, when it needlessly and vexatiously duplicates such action, or when the Federal Government has expressly excluded state participation whether consistent or not. Demonstrating the Supreme Court's agreement with this conception, the *O'Brien* and *Wisconsin Public Utilities* cases tell us that peaceful strikes for higher wages are regulated and privileged by federal law to such a degree that there is simply no room for state action in regard to them.

In the *Briggs-Stratton* case,⁸² however, we have the Supreme Court's own word for it that the states may still regulate strikes which are neither regulated nor privileged by federal law, so long as the basis of regulation lies in the method or the objective of the strike, and not in the mere fact that it is a strike. Pre-emptionists have a good deal of trouble with the *Briggs-Stratton* case. Professor Cox,⁸³ for example, has repeatedly failed to understand that *Briggs-Stratton* makes the one great point that not all concerted labor activities are immunized by Section 7 of the National Labor Relations Act simply because of their quality of concert. Perhaps the reason for the failure of

⁸² *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949) (upholding the right of a state to outlaw "quickie" strikes left unregulated by federal law).

⁸³ Cox and Seidman, *supra* note 2, at 232-34; Cox, *supra* note 2, at 335-38. We shall take up this matter in more detail in part C, *infra*.

the pre-emptionists to register understanding of this relatively simple feature of *Briggs-Stratton* lies in the fact that it blows a gaping hole in their position. For the case means that there is room for state regulation of strikes and other concerted action so long as the states do not attempt to outlaw such action simply because it is concerted, and so long as the state regulation does not clash with federal regulation, as did the Michigan strike-vote law and the Wisconsin compulsory-arbitration statute.

The *Briggs-Stratton* case is valuable also because it squarely faces another troublesome problem—that of whether there is an implicit conflict every time a state regulates a form of concerted action which is not regulated at all by federal law. One *might* argue, it must be conceded, that the combination in the federal law of (1) a guarantee of the right to engage in concerted activities, and (2) the regulation of *some* concerted activities, meant on the whole that those concerted activities not regulated by the federal law should be considered immunized. Or, to put the matter another way, one might argue that there is a conflict every time that a form of conduct not unlawful under federal law is made unlawful by state law. This possibility is laid to rest by the *Briggs-Stratton* case, for there the Supreme Court upheld the State of Wisconsin's outlawing of strike action which was left unregulated by the federal law. Perhaps the profoundest significance of the *Briggs-Stratton* case lies in the fact that it leaves the states free to continue their common-law development of a code of permissible objectives of union action. But of this more later in part C. At present it is necessary to complete the analysis relating to conflicting state action.

Beyond any question, the situation which presents the greatest potentiality of conflict is that involving the selection of employee representatives. This process is controlled, under both state and federal labor relations acts, by admin-

istrative agencies which are endowed as a rule with considerable discretionary leeway in regard to the selection of appropriate bargaining units, the determination of employee eligibility to vote, and consideration as to whether or not there is an existing question of representation. It is self-evident that where two or more deciding tribunals exercise discretionary powers, and where the alternatives available are numerous, as they are in representation proceedings, the probability of conflicting choices is great.⁸⁴ Hence the Supreme Court's decisions in *Bethlehem Steel*⁸⁵ and *La Crosse Telephone*,⁸⁶ to the effect that state labor relations boards may not entertain representation petitions in industries over which the National Board has jurisdiction, seem eminently sensible, and explicable entirely on the basis of the Constitution's Supremacy Clause, without the necessity of resort to the hopelessly vague and inchoate concept of pre-emption by mere occupation of the "field."

This analysis reconciles all the cases, and leaves only one loose thread, the Court's four-word per curiam decision in the *Plankinton* case⁸⁷ — a case which involved an unfair-practice charge. Our first instinct is to treat this case as summarily as the Supreme Court did. The Court scarcely measures up to its tremendously important role when, in a subject matter so freighted with significance and plagued with confusion as the present one, it vacates the decision of a state's highest court with the cryptic declaration, "The judgment is reversed." However, the facts that the per curiam decision cited *Bethlehem Steel* and *La Crosse* and

⁸⁴ In fact, even the statutes themselves contain numerous conflicting rules in regard to the selection of bargaining representatives. See Smith, *supra* note 2, at 620-21, especially notes 60 and 61.

⁸⁵ *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947).

⁸⁶ *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 69 S.Ct. 379, 93 L.Ed. 463 (1949). For detailed support of the conclusion that these cases go off on the conflict issue, see Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LAB. L.J. 3, 73-74 (1952).

⁸⁷ *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953, 70 S.Ct. 491, 94 L.Ed. 588 (1950).

that later, in the *Wisconsin Public Utility* case, the Chief Justice took occasion to "explain" *Plankinton*, do provide a basis of analysis. In terms of our understanding of *Bethlehem Steel* and *La Crosse* as sketched above, the citation of those cases in the *Plankinton* per curiam decision suggests that in the latter the Court was merely extending the principle of those cases to an instance where a state administrative agency took jurisdiction of an unfair-practice charge. If this be the true analysis of *Plankinton*, the decision seems fairly sound; it is by no means unthinkable that administrative agencies, relying as they do on discretion and expertise, might often differ even in the relatively more definite and circumscribed unfair-practice cases. However, there is also another possible explanation. Since *Plankinton* involved facts which added up to unfair practices under the NLRA as well as under the state labor relations act, Section 10(a) of the NLRA is relevant. That section, with which we shall presently deal in more detail, generally provides that the NLRB's power to prevent the unfair practices defined in the Act is not to be affected by the action of any other agency. As we shall see, this may well mean that state labor boards are precluded from taking jurisdiction over any unfair-practice charge which is subject to the jurisdiction of the national board, as was the charge in *Plankinton*. Thus there are at least two explanations of *Plankinton* which are satisfactory entirely without resort to the general pre-emption doctrine.

The matter might be left here except for the complications raised by the Chief Justice's later "explanation" of the case. In a footnote in the *Wisconsin Public Utility* case, the Chief Justice had this to say of *Plankinton*:⁸⁸

. . . [In *Plankinton*] the Wisconsin Employment Relations Board had, with the approval of the State Supreme Court,

⁸⁸ *Amalgamated Ass'n of Street etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 390 n. 12, 71 S.Ct. 359, 95 L.Ed. 364 (1951).

ordered reinstatement of an employee discharged because of his failure to join a union, even though his employment was not covered by a union shop or similar contract. Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the 'right to refrain from any or all of such activities,' at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. *Plankinton* and *O'Brien* both show that states may not regulate in respect to rights guaranteed by Congress in § 7.

The last two sentences make all the trouble. In the penultimate sentence, the Chief Justice seems to imply that no state may in any way regulate concerning the rights of employees, and this is of course pre-emption of the most extreme sort. But the last sentence takes it all back, and ultimately asserts no more than was made perfectly clear by *Briggs-Stratton*; namely, that the states may *not* regulate activities *protected* by Section 7 of the NLRA, but that they *may* regulate all activities *not* protected by Section 7. The point is important enough to justify elaboration. If *Plankinton* stands for extreme pre-emption, then no state authority — legislative, judicial or administrative — may in any way deal with cases involving the employee rights *mentioned* in Section 7 of the NLRA. Whether the state treatment is consistent or inconsistent, or presently or potentially in conflict makes no difference; the fact that the *general* subject covered by Section 7 is involved in the case completely vitiates state action. Thus, under this interpretation, not even a state court could enjoin minority picketing for immediate recognition where no other union has been certified; and this would be so even though such picketing is not an NLRA unfair practice and is probably not a protected concerted activity under Section 7 of the

NLRA.⁸⁹ In short, the state action would be precluded despite the absence of a present or even potential conflict with the NLRA, and despite the fact that it would really effectuate the national policy against restraint or coercion by union and employers; for minority picketing for immediate recognition does involve both direct coercion by the picketing union and an indirect attempt by that union to cause the employer to coerce his employees' choice of representatives.⁹⁰

On the other hand, if the last sentence of the Chief Justice's "explanation" of *Plankinton* be the true explanation no such drastic results would follow; *Plankinton* would then march along with *Bethlehem Steel*, *La Crosse*, *Briggs-Stratton*, *O'Brien*, and the *Wisconsin Public Utility* case — all standing for the proposition that state regulation must bow where it is either actually or potentially in conflict with the federal law.

In the circumstances, the choice as to the meaning of *Plankinton*, and of the Chief Justice's explanation, ought to be clear for disinterested students. A per curiam holding with no legal analysis ought not to make new law of a most significant sort, certainly not when the new law is really proposed in an ambiguous footnote-explanation of the per curiam decision in a later case. The fair function of a per curiam decision is to dispatch a case on the basis of the existing precedents, and this is what the Supreme Court seems to have done in *Plankinton* by citing *Bethlehem* and *La Crosse*, both of which went off on the point of actual or potential conflict between the state and federal laws.⁹¹

⁸⁹ Cf. Feldblum, *supra* note 2, at 193 *et seq.*

⁹⁰ *Building Service Employees International Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045 (1950). Cf. Petro, *Picketing for Union Recognition*, 2 LAB. L.J. 723 (1951), *Recognition of Picketing Under the NLRA*, 2 LAB. L.J. 803 (1951), *State Jurisdiction to Control Recognition Picketing*, 2 LAB. L.J. 883 (1951).

⁹¹ See note 86 *supra*.

B. Consistent State Law:

Other things being equal, it would seem to follow as a matter of course that there should be room for state action in the labor relations field where such action is consistent with federal law. Physical and fiscal limitations on federal agencies, the greater familiarity of state agencies with local problems, the greater speed with which troublesome dispute-situations could be met—all these would dismiss as a regressive nationalistic fetishism an insistence upon the ouster of state action which could only make more effective the national labor policy. As usual, however, other things are not equal. Such decisions as *Plankinton* and such statutory provisions as Section 10(a) of the NLRA suggest that at least state labor relations *boards* may not take jurisdiction in interstate situations even under consistent state law. Although state statutes may be consistent on their face with federal statutes, the fact that both are administered by agencies which possess considerable “discretion” creates a strong potential of conflict. Then too, there is the problem of conflicting remedies, present or potential, even where state and federal substantive laws are the same. The rule for state participation in the enforcement of national labor policy must be drawn from these tangled variables.

For present purposes we shall assume that *Plankinton* is an application of Section 10(a) of the NLRA, and that the case and the section establish that state labor relations boards may not pass upon unfair-practice charges under provisions of state labor relations acts which are identical to the national act.⁹² This assumption leaves the problem of whether the case and the section preclude the assumption of jurisdiction by state *courts* under state law, common

⁹² For further development of this point see Petro, *State Jurisdiction to Regulate Violent Picketing*, 3 LAB. L.J. 3, 69 *et seq.* (1952).

or statutory, over types of human conduct which amount to unfair practices under the NLRA.

In *Costaro v. Simons*,⁹³ the New York Court of Appeals seems to have held that in such a situation the complaining party must exhaust his administrative remedies under the national legislation before seeking relief in a state court under common-law sanctions. The case involved conduct by a union which amounted to both an unfair practice under the NLRA and a tort under New York common law. Other courts have gone beyond the position thus taken by the New York Court of Appeals to hold that they simply have no jurisdiction in a case which involves conduct violative of both state law and the NLRA.⁹⁴ Presumably such courts would not take jurisdiction even if the NLRB, in the exercise of its apparently unreviewable discretion, should refuse to assume jurisdiction. At least one court has recently gone to the opposite extreme, however, holding that it had jurisdiction to pass upon an alleged violation of the NLRA itself.⁹⁵ Citing the local significance of the dispute involved, this court was completely unembarrassed by the fact that the conduct in issue was apparently not violative of state law and that the only source of sanction was the NLRA, whose administration is normally thought to be the primary, if not exclusive, responsibility of the National Labor Relations Board.

Aside from the pre-emption argument and the superficial nationalism which it represents, there are only two factors which tend to make questionable the exercise of jurisdiction by state courts under state law over human conduct which also violates the NLRA. The first of these

⁹³ 302 N.Y. 318, 98 N.E.(2d) 454 (1951).

⁹⁴ *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W.(2d) 94 (1950).

⁹⁵ *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 256 Ala. 678, 57 So.(2d) 112 (1951), *cert. granted*, 343 U.S. 962, 72 S.Ct. 1061, 96 L.Ed. 1360, *cert. dismissed as improvidently granted*,U.S....., 73 S.Ct. 196, 97 L.Ed. *127 (1952).

factors is Section 10(a) of the NLRA, which provides as follows:⁹⁶

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

The argument that this section precludes state-court action against the types of conduct outlawed in Section 8 of the NLRA has some technical merit, so long as attention is directed superficially to the words of the section and diverted from the general thrust of the section and its background. The section *does* say that the power of the NLRB to prevent the unfair practices listed in Section 8 is not to be affected by *any* other method of adjustment. Furthermore, it is only an accident, for purposes of the present discussion, that the second sentence does not read "This power shall be *exclusive*." For the word "exclusive," contained in the corresponding section of the Wagner Act, was dropped in the present version for reasons having nothing to do with the state-federal problem.⁹⁷ Hence, for present purposes, we should read the second sentence as if it contained the word "exclusive."

However, it is submitted that real understanding of the

⁹⁶ 61 STAT. 146 (1947), 29 U.S.C. § 160 (Supp. 1952).

⁹⁷ Cf. *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 167 F.(2d) 183, 187 (4th Cir. 1948).

purpose of the section, even reading in the word "exclusive," can commence only by noting what the section does *not* say. The section does *not* say that "The Board is exclusively empowered to hear and decide all cases involving the types of human conduct which amount to the unfair practices listed in Section 8." And the fundamental reason why the section does not so read is that its framers never thought in terms of excluding court proceedings under state law, common or statutory. The framers of the Wagner Act originally wrote the section. When they wrote it the Act contained no restrictions on union conduct, and at that time no state court could have jurisdiction over *employer* conduct in labor relations, which was the only type of conduct outlawed by the Wagner Act; for there was simply no common or statutory law restraining employer conduct of the type outlawed in the Wagner Act. Clearly, therefore, the section could not have been originally drafted with preclusion of state-court action in mind since there was no reason to suppose that state courts would take any case involving Wagner Act unfair practices.⁹⁸

The remainder of the language in the first part of Section 10(a) (preceding the proviso) bears out this analysis. Note the words "prevent," "adjustment" and "prevention." These are not the words one would use if one wished to preclude the normal activity of courts. Courts do not "prevent" or "adjust." They simply adjudicate, giving relief in the form of judgments and decrees. Viewing the section as a whole, and in terms of the administrative-law approach controlling when the Wagner Act was drafted, it seems a virtual certainty that the section was designed simply to insure that the Board set up by the Act would not be hampered by private agreements between employers, unions and employees, or by the conduct of other ad-

⁹⁸ Professor Smith comes to a similar conclusion after analyzing the legislative history of the Wagner Act. Smith, *supra* note 2, at 606 n. 28.

ministrative agencies then active in the federal field.⁹⁹

That the same considerations were probably controlling in the Eightieth Congress, which passed the Taft-Hartley Act and added the proviso in Section 10(a), can readily be demonstrated.¹⁰⁰ As to background, it is settled that the Eightieth Congress was preoccupied, in rewriting the section, with two factors, both completely bound up with state labor relations boards, not state courts: first, the decision of the Supreme Court in the *Bethlehem* case,¹⁰¹ emphasizing the possibility of cession agreements between the national board and state boards, and second, the fact that the state labor relations acts, administered by administrative agencies, were by and large of the Wagner Act type, containing no sanctions against labor unions and fully protecting the rights of supervisors to organize and bargain collectively. The Eightieth Congress was concerned only with seeing that their own restrictions on union action and their other refinements of the Wagner Act would not be undercut by state agencies;¹⁰² hence the *absolute* preclu-

⁹⁹ *Ibid.* Cf. *Wisconsin Labor Relations Board v. Rueping Leather Co.*, 228 Wis. 473, 279 N.W. 673 (1938), which contains an excellent analysis of both the text of § 10 (a) and its background.

¹⁰⁰ Professor Smith seems inclined to think that § 10 (a) in Taft-Hartley goes further than § 10 (a) in Wagner in ousting state-court jurisdiction. Smith, *supra* note 2, at 611-13. But his inclination rests fundamentally on the statement in the House Committee Report quoted and discussed in note 79 *supra*. Aside from that statement, Smith thinks that the balance of the evidence is against preclusion of state-court action by § 10 (a). Since we have demonstrated in note 79, *supra*, the weakness of reliance upon that statement for the meaning of § 10 (a) in Taft-Hartley, we assume that we have Professor Smith on our side on this issue. And we add to our own his argument: "At the same time note should again be taken of the ambiguity of section 10 (a). If it had been intended to suspend the operation of the state police power in the field of management-union relations, except as otherwise expressly provided or as necessarily implied it would seem that clear language to this end would have been used in view of the importance of the result. Legislators who were trying to produce some 'equity' or 'balance' in the federal labor relations law cannot reasonably be credited with an unexpressed intention to free unions (or for that matter employers) from state restrictions." Smith, *supra* note 2, at 613.

¹⁰¹ *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947).

¹⁰² SEN. REP. NO. 105, 80th Cong., 1st Sess. 4-6, 10-12, 26 (1947). There is virtually no discussion in the Senate Report of preclusion of state-court action; in such circumstances Professor Smith's remarks, quoted note 100 *supra*, seem especially pointed.

sion of state-agency action in any of the nationwide industries mentioned (mining, manufacturing, etc.). Finally, a more attentive textual analysis will conclusively demonstrate that the Eightieth Congress could scarcely have been thinking of precluding action by state courts: *there is no way in which the NLRB could cede jurisdiction to state courts*. Thus the proviso, the only addition to 10(a) made by the Eightieth Congress, must have been conceived entirely without reference to action in state courts.

Neither the grant of authority to the NLRB preceding the proviso, then, nor the proviso concerning cession of jurisdiction to state agencies itself can straightforwardly be read in terms of preclusion of action in state courts. Perhaps it is not irrelevant to note, moreover, the greatest non-legal weakness inherent in any suggestion to the effect that the Eightieth Congress meant to preclude state-court action. State courts are likely to be involved in labor disputes only on petition to restrain one or another form of unlawful union action. To suggest that the Eightieth Congress meant to inhibit such state-court intervention in labor disputes may be clever, but it is not persuasive.¹⁰³

Although there is thus nothing in Section 10(a) which precludes state-court action, based on state common-law or statutory sanctions similar to the unfair labor practices defined in Section 8 of the NLRA, another argument has been advanced for precluding state-court action. This is the contention that the procedures and sanctions against conduct amounting to unfair practices are different in state courts from what they are under the NLRA. Thus, the argument runs, a state court may grant an immediate injunction or damages on suit by a private party, whereas no private party may directly secure an injunction, or even damages as a matter of personal right, if he proceeds under

¹⁰³ Professor Smith has put the same point slightly differently. See note 100 *supra*.

the NLRA. In fact, this argument proceeds, the Eightieth Congress deliberately withheld from private parties the right to secure direct injunctive relief against even the types of union conduct with which the Eightieth Congress was most concerned.

There are a number of deficiencies in this line of argument. In the first place, proposals the Eightieth Congress may have rejected become irrelevant once it is accepted that the Congress had no intention to abolish state-court jurisdiction. Moreover, as the disinterested pre-emptionists themselves state, a rejection of a proposal in Congress cannot, without more, invalidate a similar state measure.¹⁰⁴ Clinching the point, Professor Smith offers the case of a proposal by a Michigan Congressman for incorporation in federal law of an existing Michigan provision.¹⁰⁵ If the proposal is rejected in the federal system, can it be soundly argued that the existing Michigan law is thereby invalidated?

Again, permitting private parties to secure direct injunctive relief against unfair practices would have involved highly complex legislative action in the Eightieth Congress. The Norris-LaGuardia Act would have had to be amended, and this would have been by no means a simple job. Yet, the fact that the Congress did not wish to undertake this job once again is absolutely no sign, in and of itself, that injunctions in state courts should be precluded. So positive and significant a limitation on state action cannot be inferred from a dubious, equivocal negative in Congress.

But the pre-emptionists insist that the control of all the types of human conduct which amount to unfair practices under the national legislation must be vested in the National Labor Relations Board if we are to have a uniform,

¹⁰⁴ Cox and Seidman, *supra* note 2, at 224 *et seq.*

¹⁰⁵ Smith, *supra* note 2, at 613 n. 44.

symmetrical development of the national labor policy.¹⁰⁶ For the state courts to take jurisdiction in unfair-practice cases (and we must remember at this point that only two or three types of *union* unfair practices are involved) would be to frustrate, embarrass and confuse such a development, it is urged. In support, they cite as their strongest example the case where a union pickets for recognition. Such action is an unfair practice under the NLRA *only*, according to current law, where another union is certified.¹⁰⁷ Only the NLRB, say the pre-emptionists, is in a solid position to tell whether the "in" union's certification is still valid; and thus it becomes obvious that it is virtually necessary to leave the NLRB with exclusive jurisdiction in *all* the unfair-practice cases, because they all involve similarly complex problems.

There is neither space nor time for an exhaustive analysis here of all the deficiencies in this set of contentions. However, as to the very case cited, two things may be noted. First, an *existing* certification is required before minority picketing for recognition becomes unlawful under the NLRA; that is the only requirement of Section 8(b) (4) (C).¹⁰⁸ The problem of whether the existing certification remains a valid one at the time of the picketing is one which the NLRB itself has engrafted on the provision. Now a state court is in as good a position as anyone else to decide whether there is an existing certification, and its jurisdiction should not be precluded merely because the NLRB has added other requirements. If there is doubt

¹⁰⁶ So, at any rate, do Cox and Seidman, *supra* note 2, argue. However, NLRB Assistant General Counsel Mozart Ratner seemed to take the position at the N.Y.U. Fifth Annual Conference on Labor that pre-emption was required by the broad considerations of federalism, whatever that may mean. We, on the other hand, insist that pre-emption is bad from either point of view—that both federal-state relations and the orderly enforcement and development of labor policy will suffer if the current pre-emption argument prevails.

¹⁰⁷ *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

¹⁰⁸ For a detailed analysis of § 8 (b) (4) (C), see Koretz, *Minority Pressure Vis-a-Vis Majority Rule in Collective Bargaining*, 2 SYRACUSE L. REV. 294, 303 *et seq.* (1951).

of the representative status of the certified union, the doubt may be resolved under the representation procedures set up by the Act specifically for that purpose; the doubt is not resolved by aggressive picketing, and the state courts should be allowed, under appropriate state law, to forbid the picketing. The Board should not be allowed to expand its powers and jurisdiction by its own fiat, even though such is the apparently normal conduct of all administrators, executives and agencies.

It must be emphasized, in the second place, that the example cited is of extremely narrow thrust. Even if some force be attributed to it, the impact vanishes, for example, in cases where no such matters as the validity of existing certifications are involved. And, by and large, with the obvious exception of Section 8(b) (5),¹⁰⁹ most of the union unfair practices do not involve such "discretionary" matters; most are tolerably tightly drawn, and at least as easily understood by state judges as by the NLRB — in fact, more easily understood by state judges if the Board's record thus far on application of the Taft-Hartley sanctions against unions is any sign of its understanding of the Act. For a far more basic weakness in the present pre-emptionist argument is its virtuous emphasis on the necessity of sole responsibility of the NLRB in the development and enforcement of a uniform national labor policy. Whether for lack of appropriations, personnel, or other reasons, the National Labor Relations Board's own deficiencies represent the greatest current obstacle to the effective enforcement of the national labor policy — the *whole* national policy, that is — which consists in essentially equal portions of a desire to promote collective bargaining, to protect the right of employees *not* to engage in union activities as well as to engage in such activities, and to outlaw employer *and* union unfair practices. In terms of

¹⁰⁹ This section leaves with the NLRB considerable discretionary leeway in deciding when union initiation fees are "excessive" or "discriminatory."

either the physical handling of cases covered by the Act or the substantive enforcement of the Act's procedures and provisions, the Board's record is scarcely a proud one. In fact, the case for arguing that the Board has virtually vetoed the essential features of the Eightieth Congress' additions to the national labor policy has enough strength that it should be presented here, in summary form, for the consideration of all disinterested analysts.

The Board's decisions on assumption or rejection of jurisdiction, once it had established its right to use "discretion" in this matter largely on the basis of the argument that confusion would thus be avoided, are so confusing that no one has been able to reconcile them.¹¹⁰ Infinitely more important, the Board has erected a set of standards which goes a long way toward eliminating the building and construction industry from the coverage of the Act—a fact the impact of which can be understood only when one appreciates two further facts: (1) that union unfair practices occur perhaps more frequently there than in any other industry, and (2) that union unfair practices *in the building and construction industry* were one of the major targets of the Eightieth Congress in the Taft-Hartley Act.¹¹¹ Again, in a complicated series of moves, the Board

¹¹⁰ See note 26 *supra*.

¹¹¹ Cf. Nicholas Palladino, 95 N.L.R.B. 1480 (1951); Joliet Contractors Ass'n, 90 N.L.R.B. 542 (1950). The Board nowhere identifies the source of its authority to waive jurisdiction over boycotts in this industry in the face of the mandate in § 10 (1) to seek injunctive relief against *all* the conduct outlawed in § 8 (b) (4) (A). Cf. Comments, 50 MICH. L. REV. 899 (1952); 60 YALE L.J. 673 (1951). The Board itself repeatedly asserted in its early Taft-Hartley decisions that the union unfair practices in the building and construction industry were one of the specific targets of the Eightieth Congress, and accordingly took jurisdiction of cases of minuscule financial proportions—stressing, entirely properly, that the cumulative effects of the unfair practices, if unchecked, would defeat the national policy against secondary union action. See, e.g., United Brotherhood of Carpenters and Joiners, 80 N.L.R.B. 533 (1948) (involving a home-remodeling job); International Brotherhood of Electrical Workers, 82 N.L.R.B. 1028 (1949) (involving a \$325 electrical subcontracting job). Somehow, the effectuation of this national policy became unimportant to the Board by 1950, when it declined to take jurisdiction over a far more extensive boycott in Joliet Contractors Ass'n, 90 N.L.R.B. 542 (1950)—a decision which the 7th Circuit Court of Appeals went so far as to call an abuse of discretion, Joliet Contractors Ass'n v. NLRB, 193 F.(2d) 833 (7th Cir. 1952).

has effectively negated the Congressional policy which was designed to provide some relief for employers by permitting them to seek an election whenever faced with a demand for recognition by a union, especially a non-majority union. Because this highly complicated matter has been dealt with in detail elsewhere, we merely mention it here, with the *caveat* that its importance far exceeds the brief space we have given it.¹¹²

The same frustration of congressional policy is evident in the Board's restrictive interpretations of all the more important union unfair labor practices added by the Eightieth Congress to the national labor policy, in Sections 8(b) (1)-(6) of the Taft-Hartley Act. Thus Section 8(b) (1) (A) of the Act, outlawing union restraint or coercion, has been so narrowly construed by the Board that it is impotent to outlaw the most widespread form of union coercion of nonunion employees, namely, minority picketing for recognition or organizational purposes.¹¹³ As to 8(b) (2), outlawing union coercion of employer discrimination against nonunion employees, the only completely effective sanctions against such union actions—the injunction, and the back-pay award solely assessed against the union—have been used only rarely or not at all.¹¹⁴ With the approval of a Court of Appeals,¹¹⁵ it must be noted, the Board has declared that it *lacks statutory power* to impose back-pay liability exclusively on the union, the party basically responsible for such unlawful discrimination.¹¹⁶ This construction simply cannot be justified on

¹¹² Petro, *Recognition Picketing Under the NLRA*, 2 LAB. L.J. 803 (1951).

¹¹³ Perry Norvell Co., 80 N.L.R.B. 225 (1948). The case for holding minority picketing for recognition an unfair practice is developed in detail in the articles cited in note 90 *supra*.

¹¹⁴ For one of the few cases in which the NLRB has sought injunctive relief, see *Jaffe v. Newspaper & Mail Deliverers' Union*, 97 F. Supp. 443 (S.D. N.Y. 1951).

¹¹⁵ *Progressive Mine Workers of America v. NLRB*, 187 F.(2d) 298 (7th Cir. 1951).

¹¹⁶ *Colonial Hardwood Flooring Co.*, 84 N.L.R.B. 563 (1949).

any straightforward analysis of the statute or of the underlying congressional policy.¹¹⁷ We may skip Section 8(b) (3), outlawing union refusals to bargain in good faith, as the Board has virtually done; we shall never know how productive this section might have been in terms of good labor relations because no thoroughgoing attempt has been made to cultivate it.¹¹⁸ As to Section 8(b) (4), outlawing certain strikes and inducements to strike, this section has been written down and rewritten by the Board so methodically¹¹⁹ that even a highly sympathetic Supreme Court demurred.¹²⁰ Section 8(b) (5), a well-intentioned but random and unimportant measure designed to indicate congressional disapproval of excessive and discriminatory

¹¹⁷ For development of this point see Petro, *Union Liability for Back Pay Under the NLRA*, 2 LAB. L.J. 83 (1951). I should like here to call especial attention to a student note published simultaneously with the foregoing, *Back Pay Awards Against Unions Under the LMRA*, 51 COL. L. REV. 508 (1951). This superior item of legal craftsmanship and disinterested analysis more thoroughly documents the same argument, namely, that the NLRB has plainly departed from both the written words of the Taft-Hartley Act and its underlying intention. It is reassuring to find some law students adhering stoutly to the principle of legislative supremacy in rule-and-policy-making, even where adherence to the principle means acceptance of some effective rules for union action. The law reviews are full of excellent student analyses of what the NLRB has done to pervert the purposes of the Taft-Hartley restrictions on unions; but it is dismaying to find that perhaps most of these analyses either shrug their shoulders and acquiesce in the NLRB program—e.g., Comments, 50 MICH. L. REV. 315 (1951), 50 MICH. L. REV. 899 (1952)—or plainly prefer the NLRB course of action, as in the Comment, *The Impact of the Taft-Hartley Act on the Building and Construction Industry*, 60 YALE L.J. 673 (1951).

¹¹⁸ Cf. *American Newspaper Publishers Ass'n v. NLRB*, 29 LAB. REL. REF. MAN. 2230 (7th Cir. 1951).

¹¹⁹ See my articles in 1 LAB. L.J. 835, 1075 (1950); Comment, 50 MICH. L. REV. 315 (1951).

¹²⁰ In *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 71 S.Ct. 961, 95 L.Ed. 1277 (1951), while agreeing with the Board as to the final result, the Court declined to accept the Board's rationale that § 8 (b) (4) prohibits only "secondary" and not "primary" labor activity. The variance in interpretation between the Court and the Board creates confusion; it is difficult to tell which Board decisions still stand. Cf. Comment, 50 MICH. L. REV. 315 (1951). One thing seems clear: The administrative and judicial amendments of § 8 (b) (4) make the section more difficult to apply than it was when only the legislature had written it. See Petro and De Maio, *Labor Relations Law in 1951 ANNUAL SURVEY OF AMERICAN LAW* 298 (1952); and also my articles in 1 LAB. L.J. 835, 1075 (1950). For an engaging but startling assertion that the Supreme Court did not go far enough in rewriting § 8 (b) (4) (A), see Frank, *The United States Supreme Court: 1950-51*, 19 U. OF CHI. L. REV. 165, 170-2 (1952).

union initiation fees, has scarcely figured at all in NLRB proceedings. But the process of cancellation of congressional purpose through clever manipulation of the words used in the Act is perhaps nowhere more evident than in the Board's construction of Section 8(b) (6), outlawing union exactions for work not performed or not to be performed. Here the Board has held that there is nothing wrong in a union's forcing an employer to hire workers to perform services he does not want performed.¹²¹

It seems perfectly plain from all this that we are not getting and that we shall not get a coherent, straightforward development of the national labor policy from the National Labor Relations Board. Both logic and experience suggest instead that we can expect from it only enforcement of NLRB policy, with all the shifts and turns and political waverings which such a policy involves. Furthermore, lest it be thought that the present Board is a particular target of criticism, we wish to let it be known that the argument is directed, not to any particular Board, but to the currently immature status of national labor policy, the chaotically erratic determinants of that policy, and the susceptibility of administrative agencies generally in such circumstances. Thus we return to the thread of the analysis by emphasizing that it would be viciously irresponsible in these circumstances to oust the concurrent jurisdiction of state courts. There is a single judicial head of this nation. If what state courts do in human situations which might also involve NLRA unfair practices is inconsistent with the national policy, rightly construed, the United States Supreme Court has the function and the duty of setting matters straight.

On the other hand, there is little merit in the argument

¹²¹ *Gamble Enterprises, Inc.*, 92 N.L.R.B. 1528 (1951), *set aside*, *Gamble Enterprises, Inc. v. NLRB*, 196 F.(2d) 61 (6th Cir. 1952). The Court of Appeals said, 196 F.(2d) at 63: "By the Board's order, the provisions of § 8 (b) (6) may be completely nullified by the mere assertion of the union that it desires to perform."

which points to the differences in procedures and remedies prevailing between the NLRB and the state courts. If a state court will immediately enjoin a secondary strike which also violates Section 8(b) (4) of the NLRA, an injunction is only what the Board itself should immediately seek to secure anyway, under the direct mandate of the Act.¹²² If a state court will give damages for, say, unlawful union discrimination, while the NLRB chooses to remedy the unlawful act in some other way, no one can say that the national labor policy has been frustrated by the variance in remedies; complaint would be sound only if the state remedy were unjust or ineffective as a means of enforcement of national policy, and neither is ever suggested. Finally, if a state court may issue an injunction without delay in certain cases where the Board remedy would be a cease-and-desist order after the normal period of a year or so, we should merely have what we have always sought — expeditious justice. Note the anomaly: the Board and its protagonists complain of the relative speed in the state courts when one of the two or three major piers under the whole structure of administrative law was its original promise of speedy justice.

The case for preclusion of state-court action based on state law substantively consistent with federal law is a case which argues in the voice of doctrinaire nationalism but which is actually designed to frustrate the congressionally established national labor policy; it pretends to be concerned with the effective development of the national labor policy but is actually concerned with vitiating one-half of that policy. Preclusion of state-court action would mean one thing today, on the whole, and only one thing: the national policy against union unfair practices would become to a considerable extent defunct. No law — not the Constitution, not the Taft-Hartley Act, and certainly not

¹²² Section 10 (1).

the existing Supreme Court precedents — requires preclusion of consistent action by the state courts. And if we think it the function of law to enforce the congressionally declared national labor policy, the proper result should not be in doubt. No state court should be obliged, as the Minnesota Supreme Court felt it was,¹²³ completely to dismiss an action brought under state law merely because the conduct in question might also violate the NLRA. At most, a state court should, as the New York Court of Appeals has done,¹²⁴ hold the case in abeyance for a reasonable period to give the NLRB a chance to accept or reject it.

On the other hand, the considerations are more evenly balanced where a case is brought to a state court and it is based, not on state common or statutory law, but on the NLRA itself.¹²⁵ The statutory language and the decisions seem to establish that the Board was to have exclusive jurisdiction over cases arising under the Act itself,¹²⁶ something which may seem conclusive to some. However, there is another side to the argument. The statutory language and the decisions in point originated in the Wagner Act, which was not at all concerned with union unfair practices. These unfair practices are more overt, more precisely defined and more amenable on the whole to traditional judicial process than the employer unfair practices with which the Wagner Act was exclusively concerned. Furthermore, the general policy considerations heretofore advanced suggest on balance that the state courts be permitted to act, in predominantly local situations at any rate.¹²⁷ In the

¹²³ *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 46 N.W. (2d) 94 (1950).

¹²⁴ *Costaro v. Simons*, 302 N.Y. 318, 98 N.E.(2d) 454 (1951).

¹²⁵ *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*, 256 Ala. 678, 57 So.(2d) 112 (1951), *cert. granted*, 343 U.S. 962, 72 S.Ct. 1061, 96 L.Ed. 1360, *cert. dismissed as improvidently granted*, *U.S.*, 73 S.Ct. 196, 97 L.Ed. *127 (1952).

¹²⁶ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

¹²⁷ *Cf. Art Steel Co. v. Velazquez*, 201 Misc. 141, 109 N.Y.S.(2d) 788 (Sup. Ct. 1952). This case makes the suggestion, which may appeal to all who are interested primarily in the enforcement of existing labor policy, that

circumstances, the student's privilege is to recommend the problem for solution to the Supreme Court.

C. Supplementary State Law:

There are, as has been stated earlier in this paper, many aspects of labor relations with which the Taft-Hartley Act is not concerned, many forms of union action which national legislation either does not control or has been held not to control. A few examples will lend concreteness to the discussion. Thus Taft-Hartley has nothing to say about union membership policies, except in the indirect sense that prior union membership may not be made a hiring condition in any interstate industry.¹²⁸ It has been construed as not outlawing the union coercion implicit in minority or stranger picketing for organizational or recognition purposes.¹²⁹ A union does not violate the Act, under current construction, where it directly induces one employer to cease doing business with another,¹³⁰ even though such an inducement usually emanates ultimately from the threat of a strike, and even though, where such an inducement is *immediately* predicated on a strike or threat of strike, the NLRB will itself hold the inducement an unfair practice.¹³¹ Finally, the Act leaves completely unregulated strikes, picketing and other boycott techniques which are aimed at such diverse objectives as driving a firm out of business, resisting technological change, or challenging employer decisions in regard to plant location, type of

the state courts should have completely concurrent jurisdiction once the determination of employee representation has been made by the NLRB. Beyond selection of representatives, with its large discretionary areas, Justice Di Falco maintains, there is no particular magic in exclusive NLRB jurisdiction to enforce national labor policy; judges can apply the rules relating to permissible overt action as well as the NLRB. Of course there can be no doubt that Justice Di Falco would draw the line at state laws conflicting with federal law.

¹²⁸ Section 8 (a) (3), NLRA as amended.

¹²⁹ *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

¹³⁰ *Rabouin v. NLRB*, 195 F.(2d) 906 (2d Cir. 1952).

¹³¹ *Schenley Distillers Corp.*, 78 N.L.R.B. 504 (1948), *enforcement granted*, 178 F.(2d) 584 (2d Cir. 1949).

product to be produced, price policies and the other matters loosely comprehended under the admittedly vague term, "management prerogatives."

As to each of these matters there is a more or less well developed body of state law, both common and statutory. Does the failure of the Taft-Hartley Act to deal with these phases and details of conduct in labor relations mean that the pre-existing state approaches can no longer be applied?

Naturally, the general pre-emption argument would answer in the affirmative, on the theory that Congress went as far as it wished the law to go in the regulation of union conduct. Of course, as we have seen, this position cannot be sustained on any demonstrably rational grounds,¹³² and the pre-emptionists have in fact admitted its weakness by making all sorts of exceptions based on evasive definitions of the "field" of labor law.¹³³ However, there are other factors which must be considered in reaching a decision as to whether state law supplementary to the federal law may apply.

Here we must revert to a line of analysis broached earlier in this paper. The first question which must be settled is whether or not the Act itself or relevant Supreme Court decisions preclude supplementary state action. Only if that question may be answered in the negative is it of practical significance to inquire into the desirability of state action on subjects not dealt with in the Taft-Hartley Act.

The question may be recast in this form: Is every type of union action not regulated by the Taft-Hartley Act absolutely privileged against state regulation? The answer depends largely upon the construction to be given to Section 7 of the NLRA. That section reads as follows:¹³⁴

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

¹³² See notes 104, 105 *supra*, and accompanying text.

¹³³ See Part II-B in text, *supra*.

¹³⁴ 61 STAT. 140 (1947), 29 U.S.C. § 157 (Supp. 1952).

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

For present purposes, the concluding portion of the first independent clause of this provision is the crucial one — the portion granting the right to engage in collective bargaining and other concerted activities. Generally speaking, there are three distinct possibilities in construing this section in terms of the present discussion:¹³⁵

1. The section might be construed as prohibiting any and all state restrictions on collective bargaining or other concerted labor activities in interstate situations.

2. The section might be construed as prohibiting only such state action as purports to outlaw collective bargaining and concerted activities in and of themselves, without regard to the manner in which the activities are carried on or their objectives.

3. The section might be construed as having nothing at all to do directly with state action; it might be construed as merely the theoretical premise on which the unfair practices, defined in the immediately subsequent sections of the Act, were predicated.

Both common sense and the consistent course of decision in the Supreme Court vitiate the first possibility; as we shall soon see, even the National Labor Relations Board has come to the conclusion that there are some labor activities which are neither expressly prohibited in Section 8(b) of the Act nor positively protected by Section 7 against Board disapproval and even state action. Of course there could not long be doubt of this, ultimate conclusion.

¹³⁵ Cf. the different approach used in Cox, *supra* note 2.

The opposite conclusion would have established for concerted union action a status of privilege which civilization will formally accord to no individual or institution. It would have meant literally a privilege for murder, so long as murder was for the mutual aid and protection of organized employees, and so long as the murder was accomplished by concerted action. Hence, even the NLRB, in arguing that an employer should not be permitted to discharge sitdown strikers, although the strikers were obviously guilty of a violation of state law, never proposed that they should be immune to prosecution under state law.¹³⁶ And the Supreme Court confirmed this position in taking the broader one that for an outright violation of state law the employer might even discharge the strikers, on the theory that an unlawful activity cannot be a protected concerted activity within the meaning of Section 7.¹³⁷ This decision — the famous *Fansteel* — thus becomes a seminal one for our discussion. It establishes that not all activities are privileged by Section 7 merely because they happen to be the concerted activities of working men in a labor dispute. And in this proposition, the Supreme Court found a solid basis for a number of other decisions, all closely relevant here. The Court subsequently held that a strike amounting to the crime of mutiny,¹³⁸ a strike to enforce a violation of a collective agreement¹³⁹ and a strike conducted in an eccentric, seriatim fashion were not protected concerted activities.¹⁴⁰ Learning from the Supreme Court, the NLRB began developing the symmetrical theory that concerted activities were protected by Section 7 only

¹³⁶ *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930 (1938).

¹³⁷ *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939).

¹³⁸ *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942).

¹³⁹ *NLRB v. Sands Manufacturing Co.*, 306 U.S. 332, 59 S.Ct. 508, 83 L.Ed. 682 (1939).

¹⁴⁰ *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949) (the *Briggs-Stratton* case).

where they were conducted in a lawful manner and for a lawful objective.¹⁴¹

This generalization immediately raises the question, however: On what basis do we decide whether the manner or objective is lawful? We cannot say that the basis is to be the Taft-Hartley Act, because it is the very silence of that Act in so many instances which raises the problem. If we were to rest on the Taft-Hartley Act we should be back where we started, holding that all concerted activities not restricted or otherwise dealt with by Taft-Hartley are absolutely privileged by Section 7 — and that, of course, is the position which the Supreme Court has rejected.¹⁴² If not the Taft-Hartley Act, then, are we to rely on state law for guidance as to which concerted activities, not restricted by national law, are to be privileged against any other restriction? Obviously, this position must likewise be rejected, in the broad form stated. The very inquiry in which we are engaged involves the assumption that some concerted activities are immune to state restriction; to say without qualification that state law should determine the scope of immunity would therefore be to beg the question. The final possibility would be to leave the determination of legality of manner and objectives largely to the NLRB and residually to the courts under the NLRA itself.¹⁴³ As we shall immediately see, however, this alternative seems likewise unavailable, even if desirable.

The second construction of Section 7, as set forth above,

¹⁴¹ Cf. *National Electric Products Corp.*, 80 N.L.R.B. 995 (1948); *American News Co.*, 55 N.L.R.B. 1302 (1944).

¹⁴² Professor Cox would probably differ on this point. Cox, *supra* note 2. But if the *Briggs-Stratton* case does not make this point it makes no point at all, for there the Court held that § 7 did not prevent a state from prohibiting a form of concerted action neither regulated nor indirectly impugned by the general policies of the Taft-Hartley Act.

¹⁴³ This is the solution advanced by Professor Cox, with the proviso that the Courts of Appeals exercise a proper restraint in reviewing NLRB decisions as to the proper scope of the protection of concerted activities. Cox, *supra* note 2, at 346: "By virtue of its experience the Board should be better versed in that than any other body." For a different view of the place of "expertise" in the law of labor relations, see Petro, *Employer Unfair Practices Under the Taft-Hartley Act—III*, 3 LAB. L.J. 387, 448 (1952).

is probably the prevailing one today, and probably the ultimately sound one, all things considered, although it does leave hanging certain matters which can be accounted for satisfactorily only by incorporating parts of the third construction offered. In the *Briggs-Stratton* case,¹⁴⁴ which we have already discussed at some length, the Supreme Court rejected the contention that all concerted activities not regulated by the Taft-Hartley Act are privileged by Section 7 against state regulation. More important for purposes of the immediate discussion, however, the Court in *Briggs-Stratton* also rejected the contention that the NLRB has exclusive authority to determine (a) which concerted activities are absolutely privileged by Section 7, (b) which are not privileged, and (c) which the states may regulate. Instead, the Court stated, in an opinion written by Justice Jackson, who cannot be called quite a "states'-righter," that some activities not restricted by national law are still not privileged against state prohibition, notwithstanding objections and contrary decisions by the NLRB.¹⁴⁵ So clearly, so often, and so forcefully did Justice Jackson make the point that the states are still free to prohibit some concerted activities not prohibited by Taft-Hartley, notwithstanding Section 7, that we must quote his opinion at some length:¹⁴⁶

Congress has not seen fit in either [Wagner or Taft-Hartley] . . . to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. . . . [A]s to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that "Congress designedly left open an area for state control" and that the "intention of Congress

¹⁴⁴ *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949).

¹⁴⁵ *Id.*, 336 U.S. at 255.

¹⁴⁶ *Id.*, 336 U.S. at 252-53, 257.

to exclude States from exercising their police power must be clearly manifested."

The . . . decisions [of the United States Courts of Appeals] and our own . . . clearly interdict any rule by the Board that every type of concerted activity is beyond the reach of the states' adjudicatory machinery.

Thus the opinion, especially in the light of the actual refusal to invalidate state action which outlawed a type of concerted activity not prohibited by national law, seems to establish beyond all doubt that there is room in the labor relations "field" for state action which goes beyond or supplements the national legislation. Perhaps the most valuable feature of the opinion, however, is its admirable and succinct formulation of the limitation on state action which the basic thrust of Section 7 imposes. Justice Jackson did not allow himself to get caught in the circular argument that Section 7 immunizes against state action only those concerted activities which the states themselves do not care to regulate. Instead, masterfully establishing the historical context and basic purpose of Section 7, Justice Jackson described the section itself as a barrier to any reversion by the states to the ancient and dubious doctrine that labor unions are in and of themselves, without regard to what they seek or how they seek it, unlawful conspiracies:¹⁴⁷

In the light of labor movement history, the purpose of . . . [Section 7] becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 . . . took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by con-

¹⁴⁷ *Id.*, 336 U.S. at 257-58.

cert, it does not mean that otherwise illegal action is made legal by concert.

Remarkably enough, this most excellent and lucid prose has proved unintelligible to so informed and literate a scholar as Professor Archibald Cox, of Harvard.¹⁴⁸ While it seems presumptuous to rephrase Justice Jackson's language, it may be helpful in the circumstances to note that what he is saying is this: The states may no longer, as was allegedly done in the *Cordwainers'* case,¹⁴⁹ for example, outlaw a peacefully conducted strike for an entirely lawful objective, solely and essentially on the ground that concerted action in and of itself is unlawful, and without regard to the ends or means of the concerted action. Justice Jackson is saying here that the states may outlaw union action which is not outlawed by the Taft-Hartley Act if the state sanction proceeds from opposition to the particular means used (*i.e.*, violence or any other method going beyond a clean-cut strike) or from disapproval of the *objective* of the union action — always providing, of course, that the state regulation does not conflict with some specific provision of federal law, as it did in the *O'Brien* case, where the state law established pre-strike procedures which varied from and conflicted with those of the Taft-Hartley Act.¹⁵⁰

Professor Cox may have been thrown off, ironically enough, by his familiarity with labor law, which, understandably, is more intimate than that of Justice Jackson. Professor Cox knows, as few other than the most informed and disinterested of labor law students know, that the criminal and civil conspiracy doctrines, so reviled and emphasized by the all too numerous demagogues in the field

¹⁴⁸ Cox, *supra* note 2, at 335 *et seq.* and n. 70; Cox and Seidman, *supra* note 2.

¹⁴⁹ *Commonwealth v. Pullis* (Phila. Mayor's Court 1806); 3 COMMONS, A DOCUMENTARY HISTORY OF THE AMERICAN INDUSTRIAL SOCIETY 60 (1910).

¹⁵⁰ *International Union of United Automobile Workers v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950).

of labor relations, were really never very important features of the structure of American labor law. He knows that perhaps not a single case involving sanctions against union action was based on the conspiracy doctrine — notwithstanding dicta to the contrary in such old chestnuts as the *Cordwainers'* case which, by the way, involved allegations of threats and violence by the unionists against the nonunionists involved; he knows that disapproval of either means or objective underlay virtually every injunction issued against union action even if it was not expressed.¹⁵¹ And with this knowledge, it becomes difficult of course to attribute a great deal of cogency or meaning to Justice Jackson's reading of the fundamental purpose of Section 7. For Professor Cox and other learned students of labor law, there is little significance, even little sense, in describing Section 7 as a barrier against reversion to criminal conspiracy days, when those days existed exclusively in the imagination of special pleaders, cursory students of labor law, and most of those members of the general public who think they know something about labor-law history.

Unfortunately, however, the meaning of Section 7 is not to be pieced out from the special insights available to a few careful scholars. Section 7 must be understood, instead, in the light of the sentiments of the people who had the most to do with labor-law developments in the last twenty years or so. And they thought — and still do think — that the "conspiracy" doctrine dominated labor law until 1932. In this perspective, Justice Jackson's reasoning and exposition seem most cogent and persuasive.

Furthermore, the simple fact is that the framers of the Taft-Hartley Act never thought of Section 7 as a complete interdiction of state regulation of concerted activities.

¹⁵¹ "Those courts which spoke in the language of the law of conspiracy generally held that the lawfulness or unlawfulness of a conspiracy depended upon its purpose and on the means which the combination invoked." Cox, *supra* note 2, at 336.

Conclusive on the point is the express acceptance in Section 13 of "limitations or qualifications" on the right to strike.¹⁵² If more evidence of conscious congressional acceptance of such limitation be needed, the most authoritative portions of the legislative history of the Taft-Hartley Act provide an abundance.¹⁵³ At most, Section 7 establishes as a polar proposition in American labor policy that the right to bargain collectively and to take other concerted action may not be vitiated in terms. The right may be regulated, but it may not be abolished. States are free, except where limited by specific provisions of the Taft-Hartley Act, to regulate the manner and objectives of concerted action. The line is drawn at the point where the states would outlaw *all* concerted action. That is what Justice Jackson was saying in *Briggs-Stratton*.

Substantial accuracy exists, it is submitted, in the view of Section 7 thus taken by Justice Jackson in the *Briggs-*

¹⁵² "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 STAT. 151 (1947), 29 U.S.C. § 163 (Supp. 1952). As a matter of accurate analysis, § 13 should never be viewed as in any sense a restriction on state action, as the Supreme Court seems to have viewed it in the *Wisconsin Public Utilities* case, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951), for the section internally restricts itself to the NLRA alone. Furthermore the concluding reference to "limitations or qualifications" on the right to strike almost definitively establishes an intention to maintain qualifications based on illegality of manner or objectives of concerted action. On this, see SEN. REP. NO. 105, 80th Cong., 1st Sess. 28 (1947); and H.R. REP. NO. 510, 80th Cong., 1st Sess. 38-40, 59 (1947) (the bill as it finally passed), quoted in part in the following footnote.

¹⁵³ The Senate and House conferees, in reporting the compromise bill which was to become law, said that they omitted in § 7 specifically to deny protection to "unlawful concerted activities" partly because "the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct" and partly because "there was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the act." H.R. REP. NO. 510, 80th Cong., 1st Sess. 38-39 (1947). The whole of this section of Report 510 should be read, and the opinion of the NLRB in *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948), as well. In the latter, the Board considered at some length the whole problem, and concluded that some concerted activities are neither outlawed by the Act itself nor protected by § 7. In now assuming the pre-emptionist position, the NLRB seems to have forgotten that it once conceded the existence of an open area between complete federal outlawry, on the one hand, and complete federal immunization, on the other.

Stratton case. Nevertheless that view does not seem to tell the whole story. The third construction mentioned above seems more satisfying, the whole structure of the National Labor Relations Act considered. Viewing the Act as a whole, it is difficult to think of Section 7 as being directed, however narrowly, primarily toward state action, even though it is clear that, under any view, Section 7, like all federal statutes, must necessarily have the effect of imposing some limitation on the pre-existing freedom of the states to enact otherwise constitutional legislation. Once a federal statute is written, no state may make a conflicting rule for a situation subject to federal jurisdiction; and because of this principle, Section 7 would necessarily affect the states under any view. But this is different from saying that Section 7 was primarily intended as a limitation on state action.

The Wagner Act was one of the most carefully, artfully and ably drafted statutes ever passed by Congress. There are those who may criticize the generality of its language and the great abdications of legislative power and responsibility which it reflected; but few will question that the Act's general structure and actual wording were well designed to achieve the ultimate purpose, that all the parts of the Act integrated in a well-knit whole. Section 7 can be completely appreciated, therefore, only when its relationship to the rest of the statute is understood.

The statute was designed as single-mindedly as possible to eliminate the economic power of the employer as a barrier to the extensive unionization which it was the policy of the Act to promote. The key provisions in the promotion of this policy were Sections 7 and 8. Section 7 granted a right to form and join unions, to bargain collectively and to take part in other concerted activities. Section 8, in subdivisions (1) to (5), went as far as artfully drafted legislation could go, short of eliminating the

employer from the scene entirely, in outlawing the use by the employer of his economic position as a means of discouraging or resisting unionization of his employees. Imbued with the precepts of the class struggle and the corollary that only the great economic power of employers stood between employees and their desire for universal unionization, the effective proponents of the Wagner Act outlawed all forms of employer interference with the right of self-organization.

Thus Section 7 seems more properly read as primarily an integral feature of the general prohibition of employer interference than as a limitation on the states. When so read, it leaves as largely an open matter the degree to which the states might regulate concerted labor activities; and this is in fact the situation which obtained under the Wagner Act. Few people questioned the right of the states to regulate the manner and objectives of union action during the Wagner Act era. When they did, the Supreme Court immediately set the matter straight. While it held that no state could accomplish a forfeiture of the basic right to self-organization and to bargain collectively,¹⁵⁴ it also held that this right was not affected in its integral features by state laws regulating concerted action.¹⁵⁵

On the whole, then, the third approach to construction of Section 7 is completely consistent with the second approach, and may in fact be regarded simply as an extension or refinement of that approach, whose value, if any, lies in its more complete and satisfying explanation of the central purpose of the section. Both approaches establish a basic residuum of rights which no state may deny to unions and employees. Both establish an area of freedom for state regulation beyond that point — so long, of course,

¹⁵⁴ *Hill v. Florida*, 325 U.S. 538, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945).

¹⁵⁵ *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154 (1942).

as the state regulation does not conflict with any specific provision of federal law.

One last pre-emptionist contention must be considered before we may take it as completely established that the framers of the Taft-Hartley Act did not intend to preclude state action which goes beyond the scope of the Act. Section 14(b) states in effect that the states may go beyond the Taft-Hartley Act in restricting the institution of compulsory unionism. If the position taken here reflects congressional intent, the pre-emptionists argue, Congress would have felt no need for such a deliberate and express delegation of state authority.¹⁵⁶

¹⁵⁶ A few other specific provisions of the Taft-Hartley Act may also be noted in this connection. Thus it might also be argued that § 303 (b) of the Act suggests congressional intent to pre-empt. That Section permits damage actions "in any . . . court having jurisdiction of the parties" against the unlawful strikes and boycotts defined in § 8 (b) (4) (A) of the NLRA, as amended. Since this is in effect a grant of jurisdiction to state courts, the pre-emptionists could as well contend here that the specific award of jurisdiction shows that Congress assumed it had pre-empted the field of regulation of these strikes and boycotts. Actually it "shows" no such thing. The specific grant of jurisdiction shows only that Congress was intent upon eliminating such strikes and boycotts from the industrial scene. In many states, the kinds of strikes and boycotts defined in § 8 (b) (4) (A) are not unlawful. Naturally the courts in those states would accordingly afford no relief, except for the power granted by § 303 (b). Section 301, giving the federal courts jurisdiction over violations of collective agreements might also conceivably be advanced by the pre-emptionists, on the theory that it demonstrates complete congressional occupation of the "field." However, neither the text of § 301, the evil to be remedied, nor the legislative history of the section, SEN. REP. NO. 105, 80th Cong., 1st Sess. 15-18 (1947), bear out the contention. Instead, they all indicate that Congress enacted § 301 mainly because not all the states had made unions suable entities, and that it did not intend to preclude state-court jurisdiction over suits for violation of collective agreements. Cf. *Wisconsin Employment Relations Board v. Bookbinders & Bindery Women's Local No. 49*, 20 CCH LAB. CAS. ¶66, 484 (1951) (holding, after a careful review of the statute and its legislative history, that the states continue to have jurisdiction to enforce collective agreements); *Fay v. American Cystoscope Makers, Inc.*, 98 F. Supp. 278 (S.D.N.Y. 1951). See also *United Protective Workers of America v. Ford Motor Co.*, 194 F. (2d) 997 (7th Cir. 1952); *Textile Workers Union of America v. Arista Mills Co.*, 193 F. (2d) 529 (4th Cir. 1951); *Masetta v. National Bronze & Aluminum Foundry Co.*, . . . Ohio App. . . ., 107 N.E.(2d) 243 (1952); *General Bldg. Contractors' Ass'n v. Local Unions*, 370 Pa. 73, 87 A.(2d) 250 (1952). Finally, § 14 (a) may have some bearing. That section recognizes, for purposes of the NLRA, the bare legal right of supervisors to organize into unions, but specifically declares that employers may not be compelled (presumably by state law) to recognize or bargain with supervisors' unions. Prima facie, this provision militates *against* the pre-emptionists in the same technical way that many of their arguments support their position. That is, one might ask why Congress felt it necessary to make *express* provision for preclusion of state law if there was an implicit assumption of pre-emption. The pre-emptionist

Like many of the pre-emptionist arguments, this one has some superficial technical merit, but its only reaction when jabbed is an expiring puff. Everyone knows that the Eightieth Congress was particularly concerned with the subject of compulsory unionism; that potent forces were at work to outlaw the institution in all its forms; and that very much alive at the time was the question whether the Wagner Act had, by accepting *all* forms of compulsory unionism, precluded the states from outlawing *any* form. Thus the deliberate, express delegation of power to the states may be entirely explained by the special circumstances surrounding the grant: Strongly opposed to all forms of compulsory unionism but unwilling itself to reject the institution completely, Congress virtually encouraged the states to go all the way and at the same time precluded all doubt of the validity of additional state sanctions. If the doubts concerning the validity of further state action were not alive — as they were not in connection with all the other subjects presently under discussion — and if the Congress were not so specifically aroused on the subject of compulsory unionism, the probability is that Section 14(b) would never have been written. As chance would have it, the congressional doubts were unfounded; the Supreme Court

rebuttal is that express congressional pre-emption was necessary here because supervisors were taken out of the "employee" category by § 2 (3) of the NLRA, as amended, and therefore out of the "field" pre-empted by the Act. Accordingly, the pre-emptionists conclude, if Congress wished completely to free employers of the obligation to recognize and bargain with supervisors' unions, an express provision such as § 14 (a) was necessary. The rebuttal has some technical merit, as most pre-emptionist arguments do. But such merit as exists once again vanishes when one notes the realities of the situation. Thus, what happens to the pre-emptionist position if a state should make it *unlawful* for supervisors to organize unions and to engage in strikes? The pre-emptionists would have to say, if their position is to have any meaning, that such state laws are precluded, because they go beyond the NLRA generally and § 14 (a) particularly, which begins with the statement: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization." Obviously, this provision restricts itself to the NLRA; it has no bearing, imposes no limitations, on state action which might go further than the NLRA. On the whole it would appear that § 14 (a), like the rest of the statute, tends to suggest that Congress was intent upon precluding, not state law generally, but only such state law as enlarged trade-union immunities to legal process.

ruled in *Algoma*,¹⁵⁷ a decision handed down after Taft-Hartley became law, that the Wagner Act did not in fact preclude additional state regulation of compulsory unionism. While this decision cannot logically be advanced as a demonstration in itself that Section 14(b) was superfluous in the Taft-Hartley Act, or that pre-emptionists are plainly wrong, it rather clearly weakens the argument that the section operates somehow to preclude all state regulation which goes beyond any of the other features of the Act.

But perhaps the most forceful refutation of any pre-emptionist argument based on Section 14(b) is that the section integrates with others in a manner distinguishable in many ways from the situation obtaining in regard to most subjects on which states may go beyond federal law. Relevant here are the numerous and complex provisions devoted to the subject of compulsory unionism in the Taft-Hartley Act: The Act concerned itself with the types of compulsory-unionism agreements permissible,¹⁵⁸ the unions which might bargain for them¹⁵⁹ and the circumstances in which action might be taken under them;¹⁶⁰ authorization and de-authorization elections were required,¹⁶¹ and unions had to file reports and affidavits as prerequisites to participation in those elections.¹⁶² With this proliferation of regulation — reminiscent of that adopted in connection with emergency strikes or strikes called to terminate or modify collective agreements — the probability of conflict between state and federal law on the same general subject matter was naturally heightened. In fact, the probability did occur — there was conflict.¹⁶³ And of course in any

¹⁵⁷ *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949).

¹⁵⁸ Section 8 (a) (3).

¹⁵⁹ Majority unions only, under § 8 (a) (3).

¹⁶⁰ *Ibid.*

¹⁶¹ Section 9 (e), which has since been amended by 65 Stat. 601 (1951), 29 U.S.C. § 159 (e) (Supp. 1952), to eliminate the original authorization requirement.

¹⁶² Section 9 (f), (g) and (h).

¹⁶³ *Western Electric Co.*, 84 N.L.R.B. 1019 (1949).

case of conflict, state law would have to bow, unless Congress had expressly delegated authority to the states, as it did in 14(b).¹⁶⁴ These considerations seem on balance to be the most compelling ones available. They are especially persuasive in that they establish a real function for Section 14(b), a function, be it noted, which challenges any attempt to use the section as an indirect, negative item of evidence of congressional intention to preclude all state action which goes beyond the regulations specifically provided in the Act.

IV.

Conclusion

All substantial legal considerations having been covered, we may now assert with some confidence that nothing in the existing legal structure precludes state action which goes beyond current national regulation of the concerted activities of labor unions—always assuming, of course, that the state action in question neither conflicts with a specific provision of the national law nor infringes upon the basic rights guaranteed in Section 7 of the NLRA. This structure, we submit, should be maintained until the national labor policy achieves and manifests in law far more precision, comprehensiveness and maturity than it now possesses. We insist, in fact, that the chances for realization of a comprehensive and enduring labor policy are increased by leaving with the states today the power to go beyond national law in regulating details of labor relations conduct.

This view gains strength when considered in the light of the particular types of action which it would leave open to the states. Generally speaking, state law may go beyond national law, without conflicting with it, in two ways: The states might regulate in a manner entirely consistent with

¹⁶⁴ Notwithstanding the delegation of power to the states, the NLRB held that the federal requirements were supreme. *Western Electric Co.*, 84 N.L.R.B. 1019 (1949).

the basic policies of national law, though going beyond the actual details of national law; and they might, in the second place, establish regulations which, while not in conflict with basic federal policy and law, are neutral in regard to them. In either event, it is difficult to see how the ultimate development of long-range national policy could help being advanced.

As examples of the first type, consider state measures which would unqualifiedly outlaw both all minority picketing for recognition and all secondary action in labor disputes. Minority picketing for recognition, as has already been argued here, always coerces employee choice of representatives for collective-bargaining purposes, and always, therefore, challenges the integrity of the current national labor policy, which is orientated in terms of employee free choice.¹⁶⁵ The fact that existing federal law does not in terms always prohibit such picketing should certainly not stand in the way of state action reaching that result. For by pursuing the logic of existing policy to that point, the states provide occasion for clear-cut analysis of the ultimate merits. Beyond any doubt, the New York Court of Appeals' forthright challenge last year¹⁶⁶ of the legality of *any* minority picketing for recognition stimulated fruitful discussion of the national labor policy as effectively as its almost precisely contrary decisions did in years gone by.¹⁶⁷ We should only lose, we should not gain, by forestalling such decisions.

The same is true in all cases where state law pushes existing national policy to new positions, beyond those which happen to have been occupied in the federal law

¹⁶⁵ See note 90 *supra*.

¹⁶⁶ *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E.(2d) 697 (1951).

¹⁶⁷ *E.g., Stillwell Theatre, Inc. v. Kaplan*, 259 N.Y. 405, 182 N.E. 63 (1932), *cert. denied*, 288 U.S. 606, 53 S.Ct. 397, 77 L.Ed. 981 (1933); *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N.Y. 260, 157 N.E. 130 (1927); *National Protective Ass'n of Steam Fitters and Helpers v. Cumming*, 170 N.Y. 315, 63 N.E. 369 (1902).

of the moment. Thus, while existing national policy would restrict the infliction of harm in labor disputes to the immediate parties, the essential elements of that policy have been only partly covered in the written law. Taft-Hartley's aim, according to its principal proponents, was to outlaw *all* "secondary boycotts";¹⁶⁸ yet, the Act failed to outlaw the ultimate in such boycotts, according to current construction.¹⁶⁹ The words of the Act make it unlawful for a union by means of a secondary strike to cause businessmen to cease doing business with one another.¹⁷⁰ But the policy of narrowing the scope and effects of a labor dispute is equally frustrated when a union induces one businessman to cease doing business with another, not by an immediate threat of strike, but on the basis of a contractual arrangement whereby the employer involved agrees to deal only with businessmen approved by the contracting union. A "hot-cargo" or "struck goods" clause widens labor disputes as clearly as, and more effectively than, a threat of a secondary strike; therefore it is at least equally in conflict with the national policy. More than that, it is so clearly in conflict that it might well have been held violative of the Taft-Hartley Act, although not in terms prohibited,¹⁷¹ except for the NLRB's penchant for restrictive interpretation whenever such interpretation serves to minimize the impact of the Act upon unions.¹⁷² In fact, since the "hot-cargo" clause is always gained in collective bargaining, and since the ultimate sanction in bargaining is the strike, a secondary boycott procured by such a clause violates even the terms of the Act, except on the speciously wooden in-

¹⁶⁸ "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." Statement of Senator Taft, 93 CONG. REC. 4198 (1947).

¹⁶⁹ *Rabouin v. NLRB*, 195 F.(2d) 906, 913 (2d Cir. 1952) (Learned Hand, J., dissenting).

¹⁷⁰ Section 8 (b) (4) (A), NLRA as amended.

¹⁷¹ And the independent NLRB General Counsel, Robert N. Denham, so argued before the Board in the *Rabouin* case, 87 N.L.R.B. 972 (1949).

¹⁷² Cf. notes 110-121 *supra*, and accompanying text.

terpretation which the NLRB has adopted.

The NLRB's refusal to pursue thoroughly the spirit and policies of its legislation in such instances does not serve to further the development of the existing national labor policy. It serves only to confuse. Basic evaluation of policy comes best when the issues are clearly drawn, and the issues can scarcely be tautly drawn when the stuff of which they are made is dispersed in a dismal chaos. Once again, then, we urge, state laws which explore the inner logic of existing policy and apply it to new situations consistently with its own premises can help considerably to shape the better labor policy of the future, whatever we may choose to make it.

The argument for allowing the states to probe *beyond* the present national labor policy has much in common with the one just advanced in favor of accepting state action which delves *within* existing policy, pursuing its implications. In the light of the incompleteness and the felt deficiencies of federal labor law today, state action which is neutral in respect to existing policy — which develops collaterally without conflicting with current policy — cannot sensibly be precluded. Our present national policy has some elements of strength; effective protection of free employee choice of representatives, for example, seems to have an appeal for Americans which promises it long life. But every careful student of labor relations and of the larger social, economic and political problems of which labor relations are so significant and symbolic a part, must feel that the problems with which national policy has not yet really grappled exceed in both numbers and importance those on which policy has crystallized. In fact, the most we can say for existing policy and law is that they have made a sound start in recognizing that both unions and employers may do things which clash with what seem to be our most cherished social goals: individual freedom and material abundance. The practical problem of fitting

unions, their objectives and their methods of reaching objectives into the scheme of things is still largely before us.

This is not the place for an extensive analysis of the deficiencies in existing national law, and we cannot hope to predict the new approaches, if any, which the states, permitted the freedom to respond to the felt needs of their members, might uncover. Yet, by mentioning briefly some of the problems with which the national policy has not come to grips—at all in some cases and only fragmentarily in others—we may further point up the doctrinaire character of the pre-emptionist position and the simple good sense inherent in the choice of leaving with the states their traditional authority to adjust the conflicts arising within their borders.

Much hard thinking remains to be done in regard to the internal affairs of unions. We have not even begun to appreciate the relationships between the way in which unions conduct their affairs internally and the external social significance of unions.¹⁷³ Meanwhile, union members and officers who have been hurt in one way or another by internal union operations—the number of cases being handed down indicates that there are many—must have some opportunity for relief, if the law is to serve its basic function in society. The state courts provide at least a forum and some measure of relief today. All other considerations aside, it would be deplorable to eliminate that minimal relief simply because the Taft-Hartley Act has made some random attempts at regulation of the operation of unions, as the pre-emptionists must urge if they contend that state action is precluded in areas entered by the national law. Moreover, the ultimate development of policy in this phase of labor relations can only be advanced by leaving room for state action now.

¹⁷³ I have elsewhere made an attempt to sketch the fundamental external policy problems posed by the internal operations of unions. Petro, *External Significance of Internal Union Affairs* in N.Y.U. FOURTH ANNUAL CONFERENCE ON LABOR 339 (1951).

Similarly, the half-formulated and even less-executed national policy against union action in restraint of trade might well achieve more concreteness and coherence if the state courts and legislatures were left free to ponder the problem. There is still much to be said for the ancient antipathy to group action which limits the free market, and so many people are saying it that we should be foolish to ignore its potentialities for the present subject. One of the basic issues of our time, indeed, may be the extent to which our encouragement of unionization requires the inhibition of this old antipathy. Advancing wholeheartedly the right of employees to organize, must we equally advance the right of employee organizations to take *all* concerted measures, short of overt violence and intimidation, in pursuit of their economic interests? The common law, the first effective resistance movement to conduct in restraint of trade, is showing us today how certain kinds of union action restrain trade, to our general detriment, and how such conduct may be prohibited without qualifying our fundamental approval of the right of self-organization.¹⁷⁴

In a closely related way, the common law continues currently to build up doctrine bearing on the permissibility of both the objectives of union action and the methods utilized by unions to gain their objectives—all on the basis of classical tort theory which is entirely dissociated from the approach of national labor law.¹⁷⁵ To be sure, the

¹⁷⁴ See, for example, *Best Motor Lines v. Int'l Brotherhood of Teamsters*, . . . Tex. . . . , 237 S.W.(2d) 589 (1951), where the court felt that a refusal to cross a picket line pursuant to a prior agreement amounted purely and simply to conduct in restraint of trade. How such an agreement, and such implementation, can be viewed as anything else is difficult for me to appreciate. Some will say that workers ought to have more freedom of combination than is allowed to others who combine to restrain trade in furtherance of their own interests. But that is not the issue. Workers already have that greater freedom, and nobody demurs. The real question is whether or not unions are to have a completely unfettered privilege to engage in combinations in restraint of trade.

¹⁷⁵ Cf. *Goodwins, Inc. v. Hagedorn*, 303 N.Y. 300, 101 N.E.(2d) 697 (1951); *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.(2d) 349 (1941).

national law does regulate union objectives to some degree and the manner of union action to a somewhat greater degree. The vital point here, however, is that the statutory method lacks the fertility of the common-law dialectic. Thus the common law has repeatedly asked over the years in particular cases whether the deliberate infliction of harm by a union pursuing a given objective or using a particular technique is justified by the acknowledged rights of employees; it has asked and continues to ask in multitudes of specific cases whether acceptance of the basic functions of unions requires the privileging of the union conduct in issue, whether it be a slowdown, a boycott resisting technological change, or a strike attempting to restrain a businessman from operating twenty-four hours daily when solid business considerations commend such operation. Out of this eternal questioning, argument and deliberation, in the context of varying social conditions and other forces, a considerable quantity of practical wisdom has accrued, much of it embodied in current statutory law, state and federal.

Now we are coming as a nation face-to-face with some of the most profoundly important consequences of the policies favoring unionism. How far are unions to be allowed to go in sharing effective control over the specific details of production? What is to be done about the power of unions to shut down production to a degree which immediately impinges on the consciousness and needs of the general public? We may be forced soon to move to new policy positions. On some matters, we agree, both law and policy preclude state participation in the process of development, but this seems scarcely the time to make labor relations and law as a whole the intramural sport exclusively of the National Labor Relations Board, or even of the National Congress.

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